Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

CHRISTA FAREED BAUER,

Petitioner,

v.

ERIC HOLDER, ATTORNEY GENERAL OF THE UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI
A097-597-220

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June 11, 2010

QUESTIONS PRESENTED

I. Whether ineffective assistance of counsel, by a non-attorney accredited representative who is government-regulated and authorized, constitutes denial of a lawfully admitted alien's right to Due Process and Sixth Amendment right to counsel, consistent with this Court's recent 7-2 holding in *Padilla v. Kentucky*?

II. Whether after about 117 years of this Court's government-favored holding in the *Chinese Exclusion Case*, the time has arrived for this Court to fully consider whether immigration removal proceedings are civil - or criminal - with a consideration of the 1893 case of *Fong Yue Ting v. United States*, recently referenced in this Court's *Padilla* holding, that included an explicit requirement that Chinese non-citizen residents could only remain in this country based on certification of the right to reside here based on [believe it or not!] "at least one credible white witness?"

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the Court of Appeals for the Seventh Circuit were Petitioner Christa Fareed Bauer and Respondent Attorney General of the United States.

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INTRODUCTION/OVERVIEW

"Deportation is ...a dreadful punishment ..." per Judge Hand in *United States ex rel. Klonis v. Davis*, 13 F.2d 630 (2nd Cir. 1926).

"In immigration matters, so much is at stake, the right to remain in this country, to reunite a [as with Petitioner's] family, or to work... [w]e reiterate that due process concerns may arise when retained [Petitioner's A.R. was retained for $400] counsel provides representation in an immigration proceeding that falls so short of professional duties as to impinge upon ... fundamental fairness."

In remanding for reopening, due to ineffective assistance of counsel by a paralegal, the above quote from the very recent case of *Aris v. Mukasey*, 517 F.3d 595, p.600 (2nd Cir. 2008), the Second Circuit panel quoted then-Judge Sotomayor in *Twum v. INS*, 411 F.3d 54, 59, n. 4, (2nd Cir. 2005), with a similar remand outcome.

Serious, life/liberty-impacting trial errors by a government authorized/regulated accredited representative (A.R.) have arisen, apparently from a handful, in 2005, (when Petitioner's travail began) exponentially to June 1, 2010, all "under the radar". Amazingly, at this time, there is virtually no redress for ineffective assistance of counsel (IAC) by a non-counsel A.R., thus rendering hollow America's Fifth and Sixth Amendments. And thus Petitioner's Petition for Writ of Certiorari, herein.

(1) What is an accredited representative (A.R)?

(2) And how does this non-attorney A.R., under - no kidding! - government authority, render legal advice within the "ambit (per Justice Stevens)" of the Sixth Amendment?

(3) And how is this "under the radar" individual's advice dealt with, especially when it prejudicially affects an alien's continued life with her husband in this country?

Believing the above three questions raised, involve issues of first impression to this Court, Petitioner submits the following, respective answers:

1. An A. R. is a non-attorney individual who provides free or low cost immigration legal help to aliens, per 8 C.F.R. 292.2 Sec. 2-3-4, Pet. App. G, pp.23a-27a, on behalf of the A.R.'s parent charitable/religious organization that has been authorized to provide such help under said regulations, all under the aegis of the Executive Office of Immigration Review (EOIR) of the U.S. Department of Justice, per 8 C.F.R. 292.2 Sec. 1-5. (Pet. App. G, *Id.*) in other words, the DOJ is the Bar Association for A.R.'s!

2. The scope of the A.R.'s legal representation and advisory capabilities, is authorized by the government in 8 C.F.R. 292.2 Sec. 1-2-3-4, wherein it generally states that the A. R. can fully represent aliens, on a paid basis before the United States Citizenship and Immigration Services (USCIS) and all immigration courts (EOIR), via a simple application

basis and without passing any proficiency examination.

Also see Pet. App. O, pp. 66a-81a, for details for obtaining EOIR-authorization to become an A.R. "...The Process of Applying For Accreditation ... Resume of Individual Applying for Accreditation ... Sec. IV ... 1. Mail [complete application] to ... Accreditation Program Coordinator, EOIR ...[etc.] That's essentially all that's required to practice immigration law to the public, as an A.R., authorized by the Government's EOIR.

3. Justice Stevens, at page 12, of *Padilla v. Kentucky*, #08 C.D.O.S. 3989, U.S. Sup. Ct. 08-651 (2010), found that per *Strickland v. Washington*, 466 U.S. 468 (1984) at p. 694 "...we ask whether there is a reasonable probability that, but for the counsel's [A.R.'s] unprofessional error(s), the result would have been different." The first prong - constitutional deficiency - is necessarily linked to the practice and expectations of the legal community, referencing standards of "effective representation".

Thereof, this court remanded *Padilla* case on the IAC issue. This picture is similar to the stealth-like IAC problems that unconstitutionally denied Petitioner 's Due Process and Right to Counsel. That is because Petitioner's removal proceeding was indeed a criminal proceeding, when the full impact of *Padilla Id.* is considered. The constitutional problem of IAC by an A.R.'s actions, is a burgeoning "under the radar" problem because to date, at most, there are only two reported cases on the subject. Interestingly, this is because there is total uncertainty at the regulatory and

judicial levels as to how to deal with liberty-impacting errors by an A.R., who is "in the EOIR Bar on a pass." as detailed at pp. 15-25 below. Also see Pet. App. O, *Id.*.

To bring this picture into full view, very simply, Petitioner Christa Fareed Bauer wants to remain in this country as the wife of her USC and decorated Navy husband Qassim Fareed. At this moment, the bad IAC provided her by a clearly government-authorized A.R. has denied her the constitutional ability to do so, and has prejudicially resulted in a current removal order against her. She has now been married to Qassim for about five years, and their petition for adjustment of status, Pet. App. K, pp. 53a-55a,was filed for them by the A.R. on November 17, 2005, with the United States Citizenship and Immigration Service (USCIS) of the Department of Homeland Security (DHS). They had a joint adjustment of status interview, to be accompanied by the A.R., scheduled at the USCIS in Kansas City for April, 2006. (Pet. App. M, p.59a-63a)

Why is this usually routine case worthy of granting her Petition for Writ of *Certiorari*? Because Petitioner, like many others with IAC problems with A.R.'s, was denied her rights to Due Process and effective counsel by a non-counsel federal government actor, that was completely "under the radar", as detailed below, that's why.

The couple thought this would be routinely simple, because their petition papers, for a nominal $400 fee, had been prepared by a pleasant, facially knowledgeable U.S. Government-approved accredited

representative (A.R.) - a federal actor of a local volunteer agency, with Department of Justice authority, to prepare and file such papers. (Pet. App. G, *Id.*)

But as detailed below, the A.R. made a terrible mistake that has turned this usually routine experience into a five year nightmare. The A.R., wrote the USCIS on November 9, 2005 (Pet. App. J, p. 51a-52a) to cancel Petitioner's previously scheduled asylum case as being trumped by said adjustment filing, and therefore instructed Petitioner to "not show", Pet. Supplement Affidavit App. I, pp. 47a-50a, for a November 28, 2005 hearing Pet. App. M, *Id.*, in EOIR-supervised (yes, the same governmental agency that regulates the A.R. - Due Process conflict?) Immigration Court on said asylum filing. That was because, the A.R. said, it would be automatically be dismissed (Judge Rovner, at the Seventh Circuit oral argument wondered whether said hearing, therefore, should have been automatically canceled?), because of the A.R.'s said adjustment filing.

Picking up where this Court very recently held in *Padilla*, *Id.*, the linked rights to Due Process, elevate an "objective standard of reasonableness" per *Strickland v. Washington*, 466 U.S. 688 (1984), at p. 694 "that we conclude that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment."

To confirm that "advice regarding deportation is included in the ambit of the Sixth Amendment, "instead of not being categorically removed from it, to the point, this Court after 117 years of demonstrating

(below) that it has ignored a fatally flawed decision in *Fong Yue Ting v. United States* 149 U.S. 698, 740 (1893) as cited in *Padilla* by Justice Steven at p. 12, is now asked to determine that it "missed the boat" in both *Fong Yue Ting* and in the earlier *Chae Chan Ping v. U.S.*, (*Chinese Exclusion Case*), 30 U.S. 581 (1889) case, original holding. See pp. 17-19 herein.

Both cases were badly flawed as detailed below, particularly at pp. 29-33. In addition to Due Process considerations, *Padilla, Id.*, held that, indeed, as concurring Justice Alito said, that "the court's decision marks a major upheaval in Sixth Amendment law", at p. 30. The clear impact of *Padilla, Id.* served to extend the Sixth Amendment constitutional protections, where a federal actor - an A.R.- has provided fatal unfairness to an unsuspecting couple who, in good faith expected and deserved Due Process of Law.

Well, you guessed'r , Chester! Petitioner, unrepresented at her EOIR-supervised asylum hearing, except by said EOIR Authorized-A.R. (Due Process conflict?) for her separate joint petition for adjustment of status to permanent residence, totally missed the hearing, because of her A.R.'s "no show" instruction. The IJ apparently did not know that Petitioner's asylum application had been canceled, therefore ordered her deportation/removal per Pet. App. A, pp. 1a-3a.

Only after the couple visited the office of private (and undersigned) attorney Allan H. Bell in North Kansas City in mid-July, 2006, and after a couple of weeks of research by said attorney, did they learn of a

major oops! problem.

Petitioner filed her Motion to Reopen on September 26, 2006, that was denied by the original IJ on November 6, 2006, essentially because she allegedly failed to file same within the so-called 180 day deadline. Pet. App. B, pp. 4a-5a.

To restate, Petitioner swears that the sole reason she missed the November 28, 2005 Immigration Court hearing that led to her removal order was because her A.R. told her not to attend same, that the hearing would be automatically canceled per the A.R.'s prior filing of a joint petition to adjust Petitioner's status, and the A.R.'s prior letter, Id. to the Asylum Office to cancel the entire asylum proceeding.

The *missing link* discovered - hopefully, not too late - in August, 2006 was that the EOIR-authorized A.R. failed to timely file a Motion for Hearing Continuance directly with the EOIR-supervised IJ, before November 28, 2005, describing the adjustment of status filing as the reason for requesting and obtaining a likely routine hearing continuance per 8 C.F.R. Sec. 1003.23, and per the well known case of *Matter of Sibrun*, 18 I&N, Dec. 354 (BIA 1983).

If so continued, Petitioner submits the IJ would have likely terminated the case, to allow the USCIS to routinely act upon said adjustment of status joint petition.

Petitioner, in all of her various court pleadings starting with her original Motion to Reopen filed on

September 26, 2006, and continuing afterwards, at various administrative court levels, has always raised the claim of ineffective counsel (IAC). That was because the A.R. clearly gave fatally defective, prejudicial, and ineffective advice which led to Petitioner's no-show at what she thought was a canceled (by her A.R.) removal hearing.

So, at law, how to:

1. Reopen Petitioner's case so that the IJ can now, and belatedly, consider their joint petition, via a Motion to Reopen?

2. Determine that ineffective assistance of counsel by a non-attorney, but government- (EOIR) authorized A.R., violates one's constitutionally protected Rights to Due Process and Counsel?

3. Determine whether such constitutional violations equitably tolls any reopening deadline, due to exceptional circumstances, per 8 C.F.R. Sec. 1003.2(g), 1003.2(c)(3), and 8 C.F.R. Sec. 1003.23(b)(i)(ii)(iii). [Tolled, per Judges Bauer, Posner, and Evans, because of counsel inadequacy, in *Pervaiz v. Gonzales*, 405 F.3d 488, 490 (7th Cir. 2005).]

4. Declare that the Right to Counsel, in a removal setting involves a Sixth Amendment protected criminal - not civil - proceeding. Thus finally, after 117 years of non-action, this court would be correcting a clearly misplaced ruling in *Fong Yu Ting v. U.S.*, 149 U.S. 698, (1893), that, among other things, required a Chinese citizen returning to his American residence to

be permitted to remain here only if his immigrant registration was certified by "a credible white citizen" at p. 730.

> According to a recent Second Circuit holding authored by Judge Katzmann in *Aris, Id.*, in vacating a BIA denial of a motion to reopen decision for further proceedings, the Court held: "That in immigration matters, where counsel provides representation that falls so short of professional duties as to impinge upon the fundamental fairness of the hearing [In *Aris*, the attorney's paralegal misadvised the client] concerning the date of an immigration hearing [causing a no-show], and then fails to inform the client of the deportation order entered *in absentia* (or variation thereof) has provided ineffective assistance of counsel, ...[including] where it is, supplied by a paralegal..." at p. 600.

The Second Circuit further cited *Twum v. INS*, *Id.*, per then-Judge Sotomayor, where she found that "with disturbing frequency this court encounters evidence of ineffective representation by attorney retained by immigrants seeking legal by attorney status in this country, [and that] IAC can constitute an "exceptional circumstance" warranting the reopening of a deportation order issued *in absentia*." See Pet. App. A, *Id.* re IJ's original *in absentia* order.

OPINIONS/COURT ORDERS BELOW

In Petitioner's case, the *in absentia* Order of Removal by the Immigration Judge of November 28, 2005 (Pet. App. A, *Id.* the IJ Order denying Motion to Reopen dated November 6, 2006 (Pet. App. B, *Id.*), Order of the BIA dated July 31, 2008 dismissing Appeal (Pet. App. C, p. 6a-13a), Seventh Circuit Decision dated November 23, 2009, denying appeal (Pet. App. D, p. 14a-20a), Order of the U.S. Court of Appeals dated January 12, 2010 denying Petition for Rehearing (Pet. App. E, p. 21a). Also, this Court, per Justice Stevens, extended the deadline for Petitioner to file this Petition for Writ of Certiorari to June 11, 2010 (Pet. App. F, p. 22a).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTORY BACKGROUND

The Immigration and Nationality Act (INA) allows acourt of appeals considering a final order of removal pursuant to 8 U.S.C. §1252 to review "all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien." *Id.* §1252(b)(9). IN IIRIRA however, Congress amended the INA to preclude judicial review of any "decision or action of the Attorney General..., the authority for which is specified under this subchapter

to be in the discretion of the Attorney General..., other than the granting of asylum. *Id* § 1252(a)(2)(B)(ii). The phrase "this subchapter" refers to subchapter II of Chapter 12 of Title 8 of the United States Code, which includes §§1151-1381.

In the "subchapter " reference to-specifically, 8 U.S.C. §1229 (a)(1) - Congress, among other things vested the IJ s with the general authority to "conduct proceedings for deciding the inadmissibility or deportability of an alien."

STATEMENT OF THE CASE IMMIGRATION PROCEEDINGS BELOW

As fully documented in the unattached AdministrativeRecord, Petitioner arrived from Zambia in the Greenbelt, Maryland, USA area on July 24, 2000, on a B-2 visitor [lawfully admitted, exactly the same as *Fong Yue Ting's* lawful admitted] Visa. There she met with a non-attorney, immigration free-lancer, Mr. Emanuel Chembe, who took her money, forged her signature to the first Asylum Application in this case on August 27, 2003 and later filed the relevant Asylum Application on November 5, 2003, and twice filed same with the (now) USCIS without her knowledge (prior mooted case 09-1280). She failed to appear before the IJ on August 8, 2005, on the first filing, because she received no notice of same and knew nothing about this proceeding. The IJ in this first asylum filing however ordered Petitioner removed, *in absentia,* to - - Zimbabwe (not Zambia). She concedes receiving notice of an Immigration Court hearing in Kansas City, due to the second fraudulent filing, from where this case

originated. Soon after, on approximately November 12, 2004, she received an ICE Notice to Appear for an immigration hearing in Kansas City on said forged asylum application, with her asylum packet and notice that the hearing date had been changed to November 28, 2005.

Well, prior to the above November 28, 2005 *in absentia* hearing, she married USC Qasim Fareed, a highly decorated Naval Officer, who has been involved with many anti-terrorist missions, on December 31, 2004. She next visited a local charity office, an EOIR - accredited agency, that has a well deserved history of providing low cost, routine immigration assistance to aliens such as Petitioner, in March, 2005. The agency provided assistance in preparing and eventual filing of a routine I-130/I-485 joint petition by the two of them to adjust her status with her husband.

During her several appointments with the Petitioner's voluntary agency and with the assistance of an EOIR-Accredited Representative (A.R.) of the agency, later identified by her initials as M.O., she and her husband prepaid all USCIS filing fees, an A.R. service fee of $400, and discussed with the A.R. the Petitioner's pending removal hearing at the Immigration Court scheduled for November 28, 2005. The A.R. (formerly known as a Volag, parlance for volunteer agency) told Petitioner that she would prepare and file the I-130/I-485 papers requested and paid for, and for Petitioner, *pro se*, to request a continuance from the IJ of her first hearing date of July 5, 2005. She did, and her case was postponed to November 28, 2005.

The A.R. filed Petitioner's I-130/I-485 joint petition on November 17, 2005 *Id.* (See Pet. App. K, *Id.*). The A.R. also told Petitioner she didn't have to appear at the November 28, 2005 hearing, because she was properly married to a USC, the A.R. had filed papers to adjust her status to permanent residence well before the hearing, the IJ would be alerted to this filing so as to routinely continue her hearing. Petitioner was informed of all information in the preceding sentence by this A.R., who was permitted to practice immigration law by federal regulations, in USCIS/EOIR proceedings, *supra*; Pet. App. G, *Id.* and that said A.R. would also request such a continuance of the November 28, 2005 hearing which she said she had done by means of a letter she sent, as an A. R. of Petitioner, to the U.S. Asylum Office in Chicago on November 9, 2005. Pet App. J, *Id.*.

Entirely relying on the A.R.'s advice, who she trusted 100% more than the earlier described Maryland confidence man, Petitioner did not attend the November 28, 2005 hearing. The IJ, seeing that Petitioner was not in attendance, issued a removal order to -egads!- Zimbabwe, determining, among other things, that this was also an *in absentia* hearing, though Petitioner had received notice of the hearing.

Petitioner was oblivious and unsuspecting of the IJ's order of removal of November 28, 2005, because, per the A.R.'s above-referenced assurances of early-November, 2005, she received a receipt notice dated November 17, 2005, that her adjustment petition had been received from the USCIS, and to report to the

USCIS in Kansas City on January 10, 2006, Pet. App. L, p. 56a-58a, for a routine fingerprinting . She received a USCIS notice form I-797C, approximately March 2, 2006, for Petitioner and her USC husband to appear at the USCIS office in Kansas City on April 24, 2006, Pet. App. M, *Id.*. This was for a routine interview, generally the final step in Petitioner obtaining adjustment of status to that of a permanent resident. This notice, on the face of it, was mailed to Petitioner c/o A.R. M.O., at the "JVS" (A.R.'s) place of business. Petitioner and her husband were thrilled with anticipation.

Unfortunately, soon after March 14, 2006, the USCIS sent a letter to the same A.R. M.O., stating that Petitioner's case was closed - - - because she was "the subject of a final removal order.." due to her involvement "in [the above] removal proceedings". Further, per Pet. App. N, p. 64a, Petitioner was informed via the A.R., dated April 10, 2006, that her I-485 interview - marked "filed November 17, 2005," 11 days before the so-called missed Immigration Court hearing - had been "canceled due to unforseen circumstances." The A.R. belatedly, after many Petitioner call to her in July 2006, notified Petitioner that she had been ordered deported.

Petitioner, and via her USC husband, attempted to protest the March 14, 2006 action to the A.R. via many calls. Petitioner attempted to notify the A.R. of her complaints about having missed the deportation hearing due to the A.R.'s mistake, but received no timely response. Petitioner was well aware of the A.R.'s volunteer, charitable, low cost activities, and did

not wish to cause trouble for the M.O. - nor other needy aliens. The A.R. finally responded in mid July, 2006 by pointing out that her letter to the USCIS of November 9, 2005, Pet. App. J, *Id.*, withdrawing Petitioner's USCIS asylum application , (the basis for the November 28, 2005 IJ hearing), was clearly meant to cancel that hearing per since, as the letter stated, "Christa hired me to represent her in her application to change and adjust her status through the marriage with her USC husband ...". Of strong importance, was that this letter, sent to the USCIS, was signed by the A.R. M.O. as "BIA Accredited". The A.R. offered no help. As stated in Petitioner's affidavit, Pet. App. I, *Id.*, the A.R. though given an opportunity to respond to Petitioner's despair and complaints of IAC, did not do so.

Petitioner via undersigned attorney filed her *Motion to Reopen* with the IJ on September 26, 2006, 176 days after she first learned, via the above USCIS case closure letter, of the said IJ's *in absentia* removal order. This was well within the statutory 180 days deadline to file a motion to reopen, which is unlimited for an *in absentia* hearing. There is unlimited time to file a motion to reopen where an *in absentia* hearing, as here, according to the IJ involved, particularly where exceptional circumstances, such as IAC are involved, per 8 C.F.R. sec. 1003.2(g) (Pet. App. H, pp. 28a-46a). Also see *Singh v. Gonzalez*, 436 F.3d 484 (5th Cir. 2006).

As detailed above, Petitioner diligently pursued her involvement with the USCIS, and EOIR Immigration Court, in a comprehensive and timely

fashion, well within her limited knowledge of American immigration requirements. Petitioner sought out A.R.'s assistance soon after her marriage to her USC (Petitioner is now married to said USC more than five years), and appeared at the USCIS building in Kansas City on February 10, 2006 for routine fingerprinting, *Id.*, as if her Immigration Court case had indeed been terminated.

Thus, Petitioner is now seeking the Honorable Court's Order, either reversing on a denial of Due Process per *Reno v. Flores* - 507 U.S. 292, 306 (1993), *supra*, and due to ineffective assistance counsel (IAC) per *Padilla Id.*, and the Sixth Amendment, due to the BIA's denial of her Motion to Reopen, or remanding the BIA's decision to the BIA for further consideration of Petitioner's appeal consistent with Petitioner's Arguments, such as equitable tolling, herein.

REASONS FOR GRANTING THE WRIT

I. That ineffective assistance of counsel, by a non- attorney accredited representative who is government-regulated and authorized, constitutes denial of a lawfully admitted alien's Fifth Amendment Right to Due Process and Sixth Amendment Right to Counsel, consistent with this Court's recent 7-2 holding in *Padilla v. Kentucky*.

Ineffective assistance of counsel, in an immigration setting, has been held to be: a performance below an objective standard of reasonableness resulting in prejudice to defendant

[alien], in violation of *U.S. Constitution Amendment 6, Armstrong v. U.S.*, 382 F. Supp. 2nd 703, aff'd 151 Fed. Appx. 155 (E.D. Pa. 2005). See also *Strickland v. Washington*, 466 U.S. 668, p. 688.

This situation, at a minimum, has led to at least four major Petitioner Remagens (bridges) to cross:

A. Whether the 7-2 decision of this court in the recent case of *Padilla v. Kentucky* can be applied to the IAC given Petitioner when Justice Stevens, stated at p. 12 of *Padilla*: "that advice regarding deportation [Petitioner's deportation hearing would be automatically canceled per the A.R.] is not categorically removed from the ambit of the Sixth Amendment right to counsel"?

B. Why is IAC when supplied by a government-authorized accredited representative (A.R.)- a violation of an alien's right to Fifth Amendment Due Process, per *Reno v. Flores, Id.*?

C. Does such a rejoinder apply to an A.R., when thatfailure of advice to the non-citizen client causes her to miss her removal hearing and prejudices her by the court ordering her removal, and thus prejudices Petitioner the abrogating her lawful ability to live in America, particularly, with her USC Navy sailor husband?

D. Whether a claim of IAC by an A.R. can be utilized to equitably toll the 180 day statutory deadline

to file a motion to reopen?

This Petition, et al. deals with the "under the radar" world of an unknown - but growing - number of U.S. Government-authorized A.R.'s. According to the Executive Office of Immigration Review 209 Statistical Yearbook, Pet. App. P, pp. 82a-83a, and 8 C.F.R. 293.2 (c) et al. Immigration Courts' representatives (attorney and A.R.s) handled approximately 110,000 such cases in 2005, growing to about 114,000 cases in 2009, in a largely unregulated and undisciplined field (concerning A.R.s) because, as evidenced to date, there are only one or two known reported cases involving an A.R., one in 2008, and one in 2009.

According to *Jones v. City of Jackson*, 203 F.3d 875 (5th Cir. 2000), per Judges Garza, DeMoss and Parker, the Fifth Amendment applies only to violations of constitutional rights by the United States, or a federal actor. According to Petitioner's Pet. App. G, *Id.*, the A.R. was a "BIA accredited representative", clearly a federal actor, 8 C.F.R. 292.2 (1-5), that authorizes Petitioner to induce public clients with an EOIR/BIA "Accredited Representative" title.

In *Padilla*, Id, this Court determined IAC existed when, at p. 14 thereof, it found that:

> "In the instant case, the terms of the relevant immigration statute are succinct, clear, and explicit in defining removal as a consequence for *Padilla's* conviction. *Padilla's* counsel could have easily determined that his plea would make him eligible for deportation simply from

> reading the text of the statute, which addresses not some broad classification of crimes, but specifically commands removal for all controlled substances convictions except for the most trivial of marijuana possession offense. Instead, *Padilla's* counsel provided him false assurance that his conviction would not result in his removal from this country. This is not a hard case in which to find deficiency."

Likewise, Petitioner's A.R., after sending the Asylum Office cancellation of Petitioner's asylum case on November 9, 2005 *Id.*, easily have contacted the EOIR Immigration Court where she was an EOIR A.R., to verify that the November 28, 2005 Hearing had been canceled. If inconclusive, to the A.R. could have filed a routine continuance request and asked Petitioner, her client, to attend the scheduled hearing per the Notice to Appear, Id., and to almost certainly obtain adjustment of status at a subsequent proceeding.

Petitioner submits that there is no appreciable constitutional difference between the *Padilla* attorney's above referenced failure to read the Kentucky statute, and resulting deportation-related "deficiency," and the A.R.'s failure to exercise her government-granted authority to make certain Petitioner's Immigration Court hearing was canceled or continued due to the A.R.'s adjustment of status filing, and asylum hearing cancellation letter. But alas, neither the Kentucky attorney, not the A.R. government actor, "acted."

This Court remanded *Padilla, Id,* for further hearing on the "prejudice" issue. All of Petitioner's

lower court proceedings unfortunately demonstrate, she submits, substantial prejudice to her legal position, because said IAC, to date, has resulted in a removal order against her, and a clear denial of her Due Process right to avoid removal from this country, so as to live with her USC husband, now of about five years.

According to *Dukuly v. Filip*, 553 F.3d 1147 (8th Cir. 2009) to establish a violation of Due Process in an immigration case, an alien must show fundamental unfairness or procedural irregularities, that prejudiced her case, per Judge Wollman at p. 1149.

According to then-Circuit Judge Sotamayor writing for the panel, with Judges Winter and Holwell, in *Twum v. INS, Id.* similar to the granting of the reopening of the motion to reopen as in *Aris Id.*, filed about two years after the IJ's Removal Order in this exclusion case, as with Petitioner's reliance on the A.R. herein, the Court remanded for consideration of the alien's reliance on whether a building guard's roadblock to missing a removal hearing was "reasonable".

According to 8 U.S.C. Sec. 1362, "In any removal proceedings before an Immigration Judge "...the person concerned should have the privilege of being represented (at no expense to the Government), by such counsel, authorized to practice in such proceeding."

In late 2006 and through mid 2008, Petitioner had hit a Bermuda Triangle situation of how and whom to complain about the IAC received by

Petitioner. As explained above, she didn't want to complain about the charitable agency A.R. that led to her removal order against her. At that time, there were no reported cases on such a complaint mechanism Petitioner's Affidavit shows diligence in trying to contact the A.R. with her complaints, "but got no response." Pet. App. 1, *Id.* (the 2008 case referenced above *In Re Zmijewska* 24 I&N, Dec. 87 (Feb. 2007) and the 2009 case, of *Omar v. Mukasey*, 517 F.3d 647, 651 (2nd Cir. 2008). Both generally refer to the BIA still propounding standards on how to deal with complaints of IAC by an A.R.).

After careful consideration of Petitioner's above arguments, particularly in light of *Padilla*, *Strickland*, *Aris*, and *Twum*, *Id.*, the Court is urged to grant Petitioner's Petition for a Writ of Certiorari.

II. That after about 117 years of this Court's government-favored holding in the *Chinese Exclusion Case*, the time has arrived for this Court to fully consider whether immigration removal proceedings are civil - or criminal - with a consideration of the 1893 case of *Fong Yue Ting v. United States*, *Id.*, and after full consideration of related cases and this Court's *Padilla v. Kentucky* holding, to determine that the removal proceedings for a lawfully admitted alien are criminal in nature, and that 117 years of case law on this subject is overruled.

Under *Strickland*, *Id.*, we first determine whether counsel's representation "fell below an objective standard of reasonableness." 466 U.S. at 688. Then, per Justice Stevens, referencing *Strickland*, we ask whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*, at 694. The first prong - constitutional deficiency - is necessarily linked to the practice and expectations of the legal community: "The proper measure of attorney performance remains simply reasonableness under prevailing professional norms." *Id.*, at 688.

Then this Court is urged to consider whether Petitioner's (and similar respondents') removal hearing(s):

(1) is (are) criminal enough to be deserving of the Sixth Amendment Right to Counsel;

(2) and whether after about 117 years, the relatively little known cases of *Chae Chan Ping v. United States* 130 U.S. 581 (1889) (*Chinese Exclusion Case)* and *Fong Yue Ting v. U.S.*, *Id.*, both late 19th century Supreme Court cases should be revisited and carefully analyzed as to whether Petitioner's (and thousands of similar) case(s) are correctly criminal proceedings, and not civil in nature, based on flawed reasoning that has laid undisturbed for more than a century, and

(3) that such flawed reasoning may well be given long, overdue impetus to reverse - even excise - the

embarrassing holding in the 1893 *Fong Yue Ting* case, that this Chinese fellow, lawfully admitted (like Petitioner, per Statement of the Case *Infra*) visitor to America could only remain here if his visa registration could only be satisfied with the "testimony of at least one credible white witness", per p. 730. Also see *Wang Wing v. U.S.*, 163 U.S. 228 (1896).

In Issue One above, Petitioner submits, this Court's recent *Padilla, Id.* holding, readily found that it was "most difficult" to separate the severe "penalty" deportation from a criminal case, saying that deportation, is not, in a strict sense, a criminal sanction, but in the same paragraph, found that though (purportedly) "civil", deportation is nevertheless intimately related to the criminal process.

And, of course, the Sixth Amendment constitutionally protected Right to Counsel, is applicable in a criminal setting, not a civil setting.

So how did this Court conclude, correctly but belatedly, that in *Padilla, Id.*, the Sixth Amendment right to counsel applied in the so-called civil - but criminal enough - context of *Padilla*'s deportation order?

Interestingly, Petitioner submits that answer is contained in the 2010 *Padilla, Id.* decision at the p. 11 citation of the very old case of *Fong Yue Ting v. United States*, 149 U.S. 698, 740 (1893).

The history of *Fong Yue Ting* and its important predecessor *Chae Chan Ping v. United States* 130 U.S.

581 (1889) (the *infamous Chinese Exclusion Case*) are magnificently detailed in the very relevant, seminal article: Straddling the Civil-Criminal Divide A Bifurated Approach to Understand he Nature of Immigration Removal Proceeding, by Peter Markowitz, Harvard Civil Rights Court Liberties Law Review, Summer 2008.

To summarize, the author's long, well documented article concluded that the Supreme Court's fundamental error for more than 100 years on this issue stems from correctly assigning the civil designation to exclusion proceedings, but lazily and incorrectly applying the civil moniker to the clearly criminal (for legally admitted aliens) expulsion proceedings .

That is because, for lawfully entitled non-citizens, who have been the subject of both removal and traditional criminal proceedings, the two can be indistinguishable but for lack of procedural protections and the often graver liberty interest at stake in the former. The Harvard article explores the tension between the firmly established civil label, and the contrary experience of people subject to solely removal/expulsion proceedings (as with Petitioner) or in combination with a criminal court proceeding.

To clarify, the *Chinese Exclusion Case* was, as its name implies, an exclusion case wherein the United States sought to prevent the entry of non-citizen from outside its borders. Four years later, in *Fong Yue Ting, Id.*, the Supreme Court clarified -somehow!- that the civil designation of removal proceedings' applies not

only to exclusion cases, used to prevent the admission of non-citizens, but applies also to expulsion cases, that is used to expel lawfully admitted non-citizens. Before *Fong Yue Ting*, this civil designation, now (mistakenly) taken for granted, was the subject of considerable debate. Since its initial pronouncement in these early cases, this has, despite frequent criticism, relied on the principle of stare decisis, and the courts repeatedly refused to revisit the issue of whether removal proceedings are civil or criminal in nature.

The deprivation of liberty from a criminal conviction can pale in comparison to the liberty interest at stake in the removal proceeding that the conviction triggers. See *Bridges v. Wixon*, 326 U.S. 135, 65 S.Ct. 1443, 89 L.Ed. 2103 (1945) (internal quotation marks omitted) and *Ng Fung Ho v. White*, 259 U.S. 216, 264 (1922). Consider that, a lawful permanent resident who is convicted of a misdemeanor marijuana offense may be sentenced to only a few days in jail. However, once in removal proceedings, federal immigration law often requires that the same lawfully permitted non-citizen to be subject to mandatory detention for the months or years it takes to complete the subsequent immigration case. The alien then may be permanently exiled from her home, livelihood, and family in the United States. The Supreme Court has compared his deprivation to a "loss of all that makes life worth living.", per Judge Douglas in *Bridges v. Wixon, Id.* at p. 147.

According to the Harvard Law Review article, the unsettling imbalance between the grave liberty interests at stake in removal proceedings - and the

relative dearth of procedural protections attaching thereto - has sparked pointed criticism of the civil label. This criticism began from the moment the civil label was first invoked. Justice Brewer, at p. 34, writing in dissent in *Fong Yue Ting*, urged: "But it needs no citation of authorities to support the proposition that deportation is punishment. Everyone knows that to be forcibly taken away from home and family and friends and business and property, and sent across the ocean to a distant land, is punishment and that oftentimes most severe and cruel."

The Supreme Court's first significant consideration of the scope and nature of the modern federal immigration power came in the 1889 *Chinese Exclusion Case, Chae Chan Ping v. United States.* After due consideration, one finds it remarkable to note at the outset that, in sharp contrast to the pervasive presence of immigration cases on the current federal docket, it took over 100 years of Supreme Court jurisprudence for this Court to make its first significant venture into this area of law. The case involved a Chinese national who had resided lawfully in the United States for over a decade. In 1887, *Chae Chan Ping* left the United States in possession of a valid reentry permit. [Similar to Petitioner's status upon the return of each to this country].

A year later, in *Fong Yue Ting v. United States*, *Id.*, this Court, as referenced in *Padilla* Id., at last squarely faced the question of whether the Constitution requires criminal protections for a non-citizen, lawfully admitted aliens facing expulsion. *Fong Yue Ting* involved three non-citizen residents of the

United States who were facing expulsion under an 1893 law that required all Chinese residents of the United States to register and obtain certificates attesting the rights to reside in the United States. The law provided for the expulsion, through judicial determination, of any Chinese resident who failed to obtain such certificates without good cause. The law explicitly placed the burden of proof on the Chinese resident in such proceedings and required that such burden could only be satisfied with the testimony of "at least one credible white witness.", at p. 730. In upholding the constitutionality of the law, this Court explicitly somehow declared that the criminal constitutional protections, including "the provisions of the constitution, securing the right of trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments have no application."

However, this court should consider the impact of *Hiroshi Motomura, Immigration Law After a Century of Plenary Power: Phantom Constitutional Norms and Statutory Interpretation*, 100 Yale L.J. 545, 564-76 (1990) (giving a thorough explanation of how courts' discomfort with their inability to apply standard constitutional scrutiny to removal cases has led them to use "phantom" constitutional norms to render purportedly subconstitutional decisions in favor of respondents); cf. *Trop v. Dulles*, 356 U.S. 86, 98 (1958) (characterizing the rule that deportation is not penal as "highly fictional"). But see *United States v. Soueiti*, 154 F.3d 1018 (C.A. 9th Cir. 1998) (holding that deportation is a criminal punishment when it is ordered, pursuant to 8 U.S.C. § 1228(c)(1), by a federal

judge sentencing a defendant for a criminal conviction).

This Court recently in *Padilla v. Kentucky* #08.651, S. Ct. March 31, 2009, held that while removal proceedings are [purportedly] "civil" Justice Stevens at p.11 *Padilla*, voiced plenty of uncertainty as to whether deportation (removal) was indeed "criminal". According to Justice Stevens, at p. 12, when he stated as follows:

> "We have long recognized that deportation is a particularly severe "penalty," [citing] *Fong Yue Ting v. United States, Id.*; ...but it is not, in a strict sense, a criminal sanction. Although removal proceedings are civil in nature, see *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1038 (1984), deportation is nevertheless intimately related to the criminal process. Our law has enmeshed criminal convictions and the penalty of deportation for nearly a century, see Part I, supra, at 2-7. And, importantly, recent changes in our immigration law have made removal nearly an automatic result for a broad class of non-citizen offenders. Thus, we find it "most difficult" to divorce the penalty from a conviction in the deportation context. *United States v. Russell*, 686 F.2d 35, 38 (CADC 1982). Moreover, we are quite confident that non-citizen defendants facing a risk of deportation for a particular offense find it even more difficult. See *INS v St. Cyr*, 533 U.S. 289 at 322 ("There can be little doubt that, as a general matter, alien defendants considering whether to enter into a plea agreement are acutely aware of

> the immigration consequences of their convictions"). Deportation as a consequence of a criminal conviction is, because of its close connection to the criminal process, uniquely difficult to classify as either a direct or a collateral consequence. The collateral versus direct distinction is thus ill-suited to evaluating a *Strickland* claim concerning the specific risk of deportation, is not categorically removed from the ambit of the Sixth Amendment right to counsel. *Strickland* applies to *Padilla's* claim."

Justice Stevens, at pp. 12-13 of *Padilla, Id.* catalogues a long list of respected authorities that "universally require defense attorneys to advise as to the risk of deportation consequences for non-citizen clients..."

This Court, in *Padilla*, confirmed the criminal-civil nexus applicable to Petitioner, by it's pronouncement at p. 13 in *Padilla*: "we too have previously recognized that [p]reserving the client' [Petitioner's] right to remain in the United States may be more important than any potential jail sentence. *INS v St. Cyr*, 533 U.S. 289, at p. 323, quoting 3 Criminal Defense Techniques Sec. 60A.01, 60A.02[2] (1991).

Therefore, is there any palpable distinction between applying Justice Steven's above words to a *Padilla* Kentucky criminal court defendant, and to Petitioner who, like *Padilla* clearly received IAC by a government-authorized A.R. when the IAC results, in either the *Padilla* or Petitioner's tributaries flowing

into to same from the Fifth and Sixth Amendments, the right to a liberty interest.

As this Court held in *Cleveland Board of Education v. Loudermill*, 105 S.Ct. 1487, 470 U.S. 532, 538-541 (1985), per Justice White on behalf of a six Justice majority, paraphrasing, as relating to due process clause provision that substantive rights of life, liberty and property cannot be deprived except pursuant to constitutionally adequate procedures, categories of substance and procedure are distinct; once it is determined that the due process clause applies, question remains what process is due.

This Honorable Court is urged to interweave the above-described tributary-like, inseparable relationship between the criminal-enough component of Petitioner's unpretty IAC removal picture, just like this Court considered the significance of the IAC rendered in *Padilla*, as being a direct or collateral consequence to define whether *Padilla's* IAC was within the scope of constitutionally reasonable professional assistance required under *Strickland*, 466 U.S., at p. 689. Justice Stevens determined that the distinction is a question [that] need not [be considered] because of the unique nature of deportation.

By the two tributaries (Fifth Amendment Right to Due Process) and (Sixth Amendment Right to Counsel), involving ineffective counsel by a government-authorized A.R. that impact the same deportation stream by causing "a particularly severe penalty", since this Court's 1893 holding in *Fong Yue*

Ting, this Court should have no difficulty in extending *Padilla Id.* fasten to constitutional protection arising from a Kansas City Immigration Court proceeding since, per Justice Stevens at p. 11, "we find it most difficult to divorce the 'penalty' from the conviction [result] in the deportation context" citing *United States v. Russell*, 686 F.2d 35, 38 (CADC 1982).

Accordingly, after full consideration of *Fong Yue Ting*, this Court is urged to overrule this regrettable decision, and squarely find that a removal hearing merits the Fifth and Sixth Amendments "panoply" of protections.

CONCLUSION

As this esteemed Court ponders Petitioner's sincere request to grant her Petition for Writ of Certiorari, the following, sagacious words of Justice Stevens in the 7-2 *Padilla* decision, at p. 6 thereof, should be well considered:

"The Landscape of Federal Immigration Law has changed dramatically over the last 90 years."

His words eminated from a retrospective look at the sad outcome of the *Fong Yue Ting* case, a 117 year old case that highlights today's Due Process need for Sixth Amendment Right to [adequate]-Counsel protection in a deportation case.

Justice Stevens, in *Padilla*, reflecting on the "particularly severe penalty" accorded in *Fong Yue*

Ting, wanted this country to know that today is a new day, "that advice regarding deportation is not categorically removed from the ambit of the Sixth Amendment right to counsel."

The Petitioner herein states strong policy reasons have been demonstrated for this Court to grant the Petition for a Writ of Certiorari herein.

Respectfully submitted,

Allan H. Bell
Allan H. Bell & Associates
Counsel for the Petitioner
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N. Kansas City, MO 64116
Telephone: (816) 421-1430
Facsimile: (816) 421-1124
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APPENDIX

APPENDIX A

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HEARING LOCATION: KANSAS CITY, MO

In the Matter of Christa Bauer
Respondent:

File: A97-597-220

IN REMOVAL PROCEEDINGS

ORDER OF THE IMMIGRATION JUDGE

This is a summary of oral decision entered on 11-28-05. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[x] The respondent was ordered removed from the United States to Zimbabwe.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of _____ with an alternative order of removal to.

[x] Respondent's application for asylum was ( ) granted, lack of presentation. ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted (X) denied ( ) withdrawn.

[ ] Respondent's application for withholding/ defferal of removal under Article 3 of Torture

Convention was ( ) granted ( ) dented ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under Section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under Section 240A(b) was ( ) granted ( ) denied ( ) withdrawn. If granted it was ordered that the respondent be issued all appropriate documents necessary to give affect to this order.

[ ] Respondent's application for a waiver under Section _____ of the INA was ( ) gratned ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application of adjustment of status under Section 212c of the INA was ( ) gratned ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under Section 246.

[ ] Respondent is admitted to the United States as until ____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

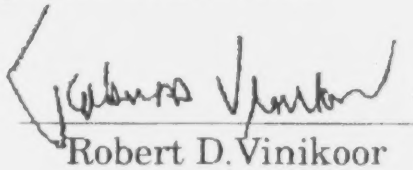
[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the immigration judge's oral decision.

[ ] Proceedings were terminated, without prejudice.

[ ] Proceedings were administratively closed.
[x] Other: In absentia hearing

Date: 11-29-05
Administrative Control Court: Immigration Court, 55 East Monroe, Suite 1900, Chicago, IL 60603. Hearing conducted by: Telephone Conference/ Video Conference
Appeal:
APPEAL DUE BY:



Robert D. Vinikoor
Immigration Judge

APPENDIX B

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court Chicago

In the Matter of: Case No.: A97 597 220

Christa Bauer

Docket: _____

Respondent/Applicant IN Removal Proceedings

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of respondent's/applicant's

_____ Motion to Reconsider an Immigration Judge's decision

__X__ Motion to Reopen proceedings

filed in the above entitled matter, it is HEREBY ORDERED that the motion _____ be granted.

__X__ be denied for the reasons indicated below:[1]

Robert D. Vinikooor
Immigration Judge
Date: November 6, 2006

[1]The respondent's motion to reopen is untimely and fails to establish the requirements for ro-opening under Section 240(b)(5)(C) of the INA. Therefore, the motion is denied. The record reflects that the respondent received both the Notice to Appear and her hearing notice for November 28, 2005. The respondent's affidavit indicates that she did not intentionally appear because she had married a United States citizen. Although the respondent claims that she may have been misinformed by a volunteer agency who helped her prepare an I130/I485 application, she has submitted nothing from this agency to show that she was misinformed or ever advised them that she was under removal proceedings. To the contrary, the agency apparently denies that they knew that she was under proceedings. The respondent's mistake falls far short of meeting the "exceptional circumstances" requirement of the statute. Moreover, the respondent did not file her motion to reopen within 180 days of the removal order in her case. Therefore, her motion is also untimely. See Section 240(b)(5)(C)(i).

Accordingly, for all of the foregoing reasons the respondent's motion to reopen will be denied.

APPENDIX C

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

ALLAN H. BELL, ESQUIRE

2022 Swift St., Ste. 202
N. Kansas City, MO 64116-3442

Office of the District Counsel/KAN
9747 North Conant Ave.
Kansas City, MO 64153

Name: BAUER, CHRISTA A097-597-220

Date of this notice: 7/31/2008

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr
Donna Carr
Cheif Clerk

Enclosure

Panel Members:
Snow, Thomas G.

U.S. Department of Justice
Appeals Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration

Files: A097 597 220 - Kansas City, MQ Date: Jul. 31, 2008

In re: CHRISTA BAUER.

IN REMOVAL PROCEEDINGS

APPEAL & MOTION·

ON BEHALF OF RESPONDENT. Allan H. Bell, Esquire

APPLICATION: Reopening

The record reflects that removal proceedings were instituted against the respondent under two different alien registration numbers. On September 28, 2004, the Department of Homeland Security (DHS) served the respondent by regular mail with a Notice to Appear under A097 126030. On November 2, 2004, the DHS served the respondent by regular mail with a Notice to Appear under A097 597 220. In this decision, we will consider the record of proceedings pertaining to A097 597 220. The appeal will be dismissed and the motion to consolidate will be denied.

On November 28, 2005, the Immigration Judge ordered the respondent removed in absentia for her failure to appear. On September 26, 2006, the respondent filed a motion to reopen acknowledging receipt of the Notice to Appear and the hearing notice rescheduling her hearing for November 28, 2005. The respondent asserted that her motion to reopen was timely because it was filed within 180 days from the date that she first learned that an in absentia order for removal was issued against her. However the respondent failed to file her motion to reopen within

180 days after issuance of the final order, as is required under section 240(b)(5)(C) of the Act. Furthermore, the respondent has not filed a joint motion to reopen. Pursuant to 8 C.F.R. §1003.23(b)(4)(iv), the time and numerical limitations shall not apply to a motion reopen agreed upon by all parties and jointly filed.

In her motion to reopen, the respondent contended that she believed the combination of her marriage and the fillings of a visa petition and adjustment of status application would cancel out any need to appear before the Immigration Judge, according to information she had received from various acquaintances at the time, nothing that she did not have an attorney to advise her on this issue. The respondent also claims that Ms. Omazic at the Jewish Vocational Services (JVS) prepared and filed the visa petition and adjustment of status application on November 17, 2005, and that she informed Ms. Omazic that she was scheduled to appear at a hearing on November 28, 2005. However, she indicates that Ms. Omazic does not recall the respondent mentioning her scheduled hearing, and she claims that there must be a misunderstanding with Ms. Omazic on this point. The DHS opposed the respondent's motion to reopen, arguing that it was not timely filed, and that she failed to demonstrate exceptional circumstances for her failure to appear. The Immigration Judge denied the motion to reopen, finding that it was filed untimely, and that she failed to establish the requirements for reopening under section 240(b)(5)(C) of the Act. The Immigration Judge noted that he respondent did not submit anything from the JVS to show that she was misinformed or ever advised them that she, was under removal proceedings.

On appeal and in her reply to the government's memorandum, the respondent raises several new issues. She now contends that she has established exceptional circumstances due to ineffective assistance of counsel, based on her claim that Ms. Omazic (a legal assistant at the JVS) informed her hat it was riot necessary to attend, her hearing on November 28, 2005, as it had been canceled out due to her pending visa petition and adjustment of status application. She also asserts that the filing deadline should be equitably tolled from at least April 2, 2006, when she first became aware of the removal order.

We have held that ineffective assistance of counsel can constitute an "exceptional circumstance" or purposes of rescission of an in absentia order where the alien establishes that the failure to appear was the result ineffective of counsel and where the criteria set forth in *Matter of Lozala*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), are satisfied, *Matter of Assaad,* 23 I&N Dec. 553 (BIA 2003). *Matter of Lozada* requires (1) that the motion be supported by an affidavit of the allegedly aggrieved respondents setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel bid or did not make to the respondent; (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him or her and be given an opportunity to respond; and (3) that the motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Id. At 639.*

The United States Court of Appeals for the

Eighth Circuit within whose jurisdiction this case arises; upheld the Board's finding that an alien failed to establish exceptional circumstances wherein she alien inconsistently claimed that she misunderstood her attorney to say that she did not need to appear, and that he outright told her not to appear. See *Gitau v. Mukasey*, 520 F.3d 906 (8th Cir. 2008) (Board did not abuse its discretion in finding that alien failed to establish exceptional circumstances, due to her inconsistent claims regarding her former attorney and the basis for her failure to appear). Similarly, in this case the respondent has presented very different allegations in her motion to reopen and on appeal regarding the basis for her failure to appear. The respondent stated in the affidavit submitted with her motion to reopen that she believed the combination of her marriage and the filings of a visa petition and adjustment of status application would cancel out any need to appear before the Immigration Judge; according to information she had received from various acquaintances at the time. The respondent also claimed that she informed Ms. Omazic that she was scheduled to appear at a hearing on November 28, 2005, but that Ms. Omazic does not recall the respondent mentioning her scheduled hearing. However, on appeal the respondent now asserts that Ms. Omazic informed her that it was not necessary to attend her hearing on November 28, 2005, as it had been canceled out due to her pending visa petition and adjustment of status application. Moreover, the respondent has failed to comply with the requirements set forth in *Lozada*. The affidavit submitted with the motion to reopen does not set forth the representations that the respondent now claims the legal assistant

made to her.[1] The respondent has not submitted any evidence that Ms. Ozamic has been informed of the allegations leveled against her and that she has been given an opportunity to respond. The respondent also has not indicated that a complaint has I been filed with any disciplinary authorities regarding Ms. Ozamic or the Jewish Vocational Services. See *Habchy v. Gonzales*, 471 F.3rd 858 (8th Cir. 2006) (alien's failure to file a *Lozada*-compliant motion to reopen within the statutory deadline bars his claim for relief on the basis of "exceptional circumstances"). Consequently, the respondent has failed to establish a valid ineffective assistance of counsel claim and has failed to establish exceptional circumstances for her failure to appear. Therefore, we need not reach the issue of whether equitable tolling should be applied in this case.

The respondent also appears to contend that her hearing should have been routinely continued under *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002), since the DHS knew, or should have known, of the visa petition and application for adjustment of status that had been filed based on the respondent's marriage to a United States citizen. The respondent does not contend that she ever sought a continuance of her hearing scheduled for November 28, 2005. The regulations provide that an Immigration Judge has the discretion to grant a request for continuance where good cause is shown. *See* 8 C.F.R. §1003.29. However, even if an alien does file a motion to continue, the parties are obligated to appear for a scheduled hearing unless and until the Immigration Judge expressly grants a request for a continuance. *See Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996) (the filing of a motion for

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[1] The "Complete Affidavit of Christa Fareed Bauer" filed on April 9, 2007, also does not address the respondent's ineffective assistance of counsel claim.

a continuance does not excuse an alien from failing to appear. The respondent never sought a continuance and was never granted such a request, nor was it the government's duty to seek a continuance on her behalf. The respondent acknowledged receipt of the Notice to Appear and the notice of hearing, both of which informed the respondent of the consequences of a failure appear. The Immigration Judge was within his bounds to conduct the proceedings in absentia.

The respondent avers that her marriage to her husband, who is an active duty and decorated member of the U.S. constitutes special circumstances entitling her to have her case reopened to consider her application for adjustment of status. The respondent has not cited any pertinent legal authority in support of her argument that the Board may reopen proceedings based on "special circumstances". However, even if we construe the respondent's contention as a request that the Board exercise its *sua sporue* authority to reopen her removal proceedings, we find that the facts presented in this case do not warrant an intervention of our *sua sponte* authority to reopen the proceedings. *See* 8 C.F.R. §1003.2(a); *see also Matter of G-D*, 22 I&N Dec. 1132 (BIA 1999); Mater of J_J, 21 I&N Dec. 976 (BIA 1997).

On April 9, 2007, the respondent filed a motion to consolidated the records in A097 126 030 and A097 597 220. As the proceeding under A097 126 030 are not currently on appeal before the Board, and the two proceeding concern separate issues of notice and exceptional circumstances, the motion to consolidated

will be denied[2]. Accordingly, the flowing orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to consolidate is denied.

FOR THE BROAD

[2] In the removal proceedings under A097 126 030, the respondent filed a motion to reopen on March 23, 2007. The DHS filed a response to the motion to reopen, stating that it did not oppose reopening and termination of the removal proceeding for lack of proper service, pursuant to *Ghounem v. Ashcroft*, 378F.3d 740 (8th Cir. 2004). The DHS did not concede that the respondent has established her true identity or that the proceeding should be reopened under A097 597 220 based on exceptional circumstances. The record reflects that the Immigration Judge did not have an opportunity to consider the respondent's motion to reopen under A097 126 030. Consequently, the record must be returned to the Immigration Judge for consideration of the respondent's motion to reopen.

APPENDIX D

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued November 17, 2009
Decided November 23, 2009

Before
FRANK H. EASTERBROOK, *Chief Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*

Nos. 08-3243 & 09-1280

CHRISTA FAREEDBAUER
Petitioner
v.
ERIC H. HOLDER, JR.,
Attorney General of
the United States,
Respondent

Petitions for Review
of an Orders of
the Boards of
Immigration
Appeals.

Order

Christa Bauer, a citizen of either Zambia or Zimbabwe, applied for asylum in the United States. (Her passport is from Zambia, and several affidavits presented in sup-

port the application for asylum acknowledge birth in that nation; but in the asylum application itself Bauer asserts that she was born in Harare, Zimbabwe, and is a citizen of that nation.) An immigration judge scheduled a hearing for November 28, 2005. Bauer did not appear. Eleven days before the hearing, she had filed a notice withdrawing the claim for asylum: she had decided instead to pursue a petition for adjustment of status on the basis of marriage. Because Bauer did not appeal:, she was ordered removed in absentia. The IJ also denied her request for asylum; apparently he had not received the notice withdrawing that request. But that decision did not matter, because the removal order rests on the facts that Bauer is neither a citizen of the United States nor the holder of a visa entitling her to be here. And once the order of removal was entered, the agency closed its me on Bauer's request for adjustment of status.

Bauer had 180 days to file a motion to reopen the proceedings, a step that could have allowed the agency to act on the petition for adjustment of status. 8 U.S.C. §1229a(b)(5)(C). She took more time than that Bauer contends that she did not learn about the removal order until April 3, 2006. Through legal counsel, she filed a motion to reopen on September 26, or 176 days after she concedes receiving actual notice. (Bauer has given at least four other dates as the receipt of notice; April 3 is the latest, so we use that without considering the consequences of this curious inconsistency.) The statutory 180-deadline runs from "the date of the order of removal", not from the date the order is received. As of April 3, 2006, Bauer had 54 days left to file a timely motion. She has never explained why she did not file within that period. Instead her lawyer has

espoused the view that the time runs from receipt of notice, rather than from the date of the removal order, and that there is therefore no delay in need of explanation. Counsel has never offered any authority for that position, however.

The IJ denied the motion to reopen, for two reasons: first, it was untimely; second Bauer has not established "exceptional circumstances" (the standard for relief on a timely motion). Bauer filed an affidavit concerning her decision to skip the hearing. In it she asserted that "I thought the combination of my marriage and the [adjustment-of-status] filing would cancel out any need to appear before the judge". Bauer did not suggest that the IJ or any of the agency's employees had advised her that she could simply ignore an order to appear for a hearing. The IJ-understandably concluded that an alien's decision to ignore an IJ's order to appear is not the sort of circumstance that justifies starting over.

On appeal to the Board of Immigration Appeals, Bauer filed a second affidavit. This time she attributed her decision to advice from Marianna Omazic, an immigration counselor (a non-lawyer assistant accredited by the agency, see 8 C.F.R §12~22(d)). Bauer did not supply any written advice to that effect from Omazic, nor did the affidavit (or any other document filed with the BIA) present Omazic's version of any conversations she may have had with Bauer. Neither the affidavit nor any other document stated that Bauer had lodged a complaint with the agency, which has the authority to remove Omazic from the rolls of accredited counselors. See 8 C.F.R. §1292.3. The BIA dismissed Bauer's appeal, ruling that the second affidavit was

no better than the first at establishing exceptional circumstances. The Board thought that, by parallel to Matter of Lozada, 19 I&N Dec. 637 (1988.), Bauer had to confront Omazic with the allegation that unprofessional advice had been rendered, obtain (and include in the record) a response to that accusation, and file a formal charge of misconduct with the regulatory body. None of these steps had been taken. Bauer then filed a motion to reconsider, which the BIA denied. We have consolidated Bauer's petitions for review of the motions to reopen and reconsider.

We held in *Kucana v. Mukasey*, 533 F.3d (2008), cert. granted, 129 S. Ct. 2075 (2009), that 8 U.S.C. §1252(a)(B)(ii) precludes jurisdiction over petitions to review or statutory or constitutional argument. Bauer contends that she has a constitutional argument that bad advice from a non-lawyer counselor means that the IJ's order violates order entered in November 200.5 The orders at issue are those entered by the BIA in 2008 (denying reopening) and 2009 (denying reconsideration of the 2008 decision). Bauer does not present any constitutional objections to *those* orders.

Whether the petition to reopen was timely, whether that time should be equitably tolled (as Bauer argued before the BIA), and whether "exceptional circumstances" support reopening are non-constitutional issues. Bauer does not contend that the Board made an error of law; instead she contends that the IJ and the BIA abused their discretion by not accepting her untimely motion and not deeming the circumstances "eceptional." Those are the very sort of discretionary decisions on which §1252(a)(2)(B)(ii) makes the administrative decision final. See, e.g. *Huang v. Mu-*

kasey, 534 F. 3d 618, 622 23 (7th Cir. 2008). See also, e.g., *Stroe v. INS*, 256 F. 3d 498 (7th Cir. 2001) (because there is no right to appointed counsel at public expense in removal proceedings, bad legal, advice is not a constitutional problem but, as in other civil litigation, is imputed to the client); *Magala v. Gonzales*, 434 F.3d 523 (7th Cir. 2005).

Kucana holds that decisions not to reopen are covered by §1252(a)(2)(B)(ii) (subject the proviso for statutory and constitutional arguments), because it reads the reference "discretion" in §1252(a)(2)(B)(ii) to include not only discretion specified in the immigration and Naturalization Act, but also discretion exercised *under* that Act. Regulations under the Act make reopening discretionary. The other possible understanding of §1252(a)(2)(B)(ii); advanced by the alien in *Kucana*, limits that statute to discretion conferred by the statutory text. If the Supreme Court should agree with that argument, ?? we would have jurisdiction. But Bauer still could not prevail, for §1229a(b)(5)(C) provides that an order of removal may be rescinded

> only—
>
> (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or
>
> (ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State

> custody and the failure to appear was through no fault of the alien

Bauer cannot use subsection (i), because her motion was filed more than 180 days after the order of removal. And subsection (ii) does not apply by its terms: Bauer does not contend that she did not receive notice of the hearing, or that she was in custody at the time of the hearing.

And even if all of this is mistaken, substantial evidence supports the Board's decision that Bauer has not demonstrated "that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section)". Subsection (e)(1) reads: "The term 'exceptional circumstances' refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien." Nothing "beyond the control" of Bauer took place, nor is mistaken legal advice comparable to extreme cruelty or serious illness. *Cf. Murray v. Carrier*, 477 U.S. 478 (1986) (when there is no right to counsel at public expense, a lawyer's incompetence is not the sort of external impediment that could excuse a procedural default). Bauer may or may not have received bad advice (her own affidavits don't agree on that point), but she could and should have notified the IJ and asked him to postpone or cancel the hearing. And she could have alerted Omazic to her current allegations, obtained Omazic's response, and filed a formal complaint. See *Omar v. Mukasey*, 517 F.3d 647, 651 (2d Cir. 2008) (the BIA is entitled to apply the *Lozada* procedure to complaints about the advice furnished by

non-lawyers). The BIA did not abuse its discretion in denying Bauer's motion.

The petitions for review are dismissed for want of jurisdiction on the authority of *Kucana;* but in an exercise of caution, given the grant of certiorari in *Kucana,* we alternatively deny the petitions on the merits.

APPENDIX E

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 12, 2010

Before
FRANK H. EASTERBROOK, *Chief Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*

CHIRSTA FAREED BAUER
Petitioner
Nos. 08-3243 & 09-1280

ERICK H. HOLDER, JR., Attorney General of the United States
Respondent.

} Petitions for Review of an Order of the Boards of Immigration Appeals.

Order

Petitioner filed a petition for rehearing on January 7, 2010. All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX F

SUPREME COURT OF THE UNITED STATES
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

April 14, 2010

Mr. Allan Harvey Bell
Allen H. Bell and Associates
2022 Swift, Suite 202
North Kansas City, MO 64116

RE: Christa Bauer
v. Eric H. Holder, Jr., Attorney General
Application No. 09A957

Dear Mr. Bell:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Stevens, who on April 14, 2010 extended the time to and including June 11, 2010.

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

Heather Trant
Case Analyst

APPENDIX G

§§292.2 Organizations qualified for recognition; requests for recognition; withdrawal of recognition; accreditation of representatives; roster.

(a) *Qualifications of organizations.* A non-profit religious, charitable, social service, or similar organization established in the United States and recognized as such by the Board may designate a representative or representatives to practice before the Service alone or the Service and the Board (including practice before the Immigration Court). Such organization must establish to the satisfaction of the Board that:

(1) It makes only nominal charges and assesses no excessive membership dues for persons given assistance; and

(2) It has at its disposal adequate knowledge, information and experience.

(b) *Requests for recognition.* An organization having the qualifications prescribed in paragraph (a) of this section may file an application for recognition on a Form G--27 directly with the Board, along with proof of service of a copy of the application on the district director having jurisdiction over the area in which the organization is located. The district director, within 30 days from the date of service, shall, forward to the Board a recommendation for approval or disapproval of the application and the reasons therefor, or request a specified period of time in which to conduct an investigation or otherwise obtain relevant

information regarding the applicant. The district director shall include proof of service of a copy of such recommendation or request on the organization. The organization shall have 30 days in which to file a response with the Board to a recommendation by a district director that is other than favorable, along with proof of service of a copy of such response on the district director. If the Board approves a request for time to conduct an investigation, or in its discretion remands the application to the district director for further information, the organization shall be advised of the time granted for such purpose. The Service shall promptly forward the results of any investigation or inquiry to the Board, along with its recommendations for approval or disapproval and the reasons therefor, and proof of service of a copy of the submission on the organization. The organization shall have 30 days from the date of such service to file a response with the Board to any matters raised therein, with proof of service of a copy of the response on the district director. Requests for extensions of filing times must be submitted in writing with the reasons therefor and may be granted by the Board in its discretion. Oral argument may be heard before the Board in its discretion at such date and time as the Board may direct. The organization and Service shall be informed by the Board of the action taken regarding an application. Any recognized organization shall promptly notify the Board of any changes in its name, address, or public telephone number.

(c) *Withdrawal of recognition.* The Board may withdraw the recognition of any organization which has failed to maintain the qualifications required by §292.2(a). Withdrawal of recognition may be accomplished in

accordance with the following procedure:

(1) The Service, by the district director within whose jurisdiction the organization is located, may conduct an investigation into any organization it believes no longer meets the standards for recognition.

(2) If the investigation establishes to the satisfaction of the district director that withdrawal proceedings should be instituted, he shall cause a written statement of the rounds upon which withdrawal is sought to be served upon the organization, with notice to show cause why its recognition should not be withdrawn. The notice will call upon the organization to appear before a special inquiry officer for a hearing at a time and place stated, not less than 30 days after service of the notice.

(3) The special inquiry officer shall hold a hearing, receive evidence, make findings of fact, state his recommendations, and forward the complete record to the Boards.

(4) The organization and the Service shall have the opportunity of appearing at oral argument before the Board at a time specified by the Boards.

(5) The Board shall consider the entire record and render its decision. The order of the Board shall constitute the final disposition of the proceedings.

(d) *Accreditation, of representatives.* An organization recognized by the Board under paragraph (b) of this section may apply for accreditation of persons of good moral character as its representatives. An organization may apply to have a representative accredited to practice before the Service alone or the Service and the Board (including practice before

immigration judges). An application for accreditation shall fully set forth the nature and extent of the proposed representatives experience and knowledge of immigration and naturalization law and procedure and the category of accreditation sought No individual may submit an application on his or her own behalf. An application shall be filed directly with the Board, along with proof of service of a copy of the application on the district director having jurisdiction over the area in which the requesting organization is located. The district director, within 30 days from the date of service, shall forward to the Board a recommendation for approval or disapproval of the application and the reasons therefor, or request a specified period of time in which to conduct an investigation or otherwise obtain relevant information regarding the applicant The district director shall include proof of service of a copy of such recommendation or request on the organization. The organization shall have 30 days in which to file a response with the Board to a recommendation by a district director that is other than favorable, with proof of service of a copy of such response on the district director. If the Board approves a request for time to conduct an investigation, or in its discretion remands the application to the district director for further information, the organization shall be advised of the time granted for such purpose. The district director shall promptly forward the results of any investigation or inquiry to the Board, along with a recommendation for approval or disapproval and the reasons therefor, and proof of service of a copy of the submission on the organization. The organization shall have 30 days from the date of service to file a response with the Board to any matters raised therein, with proof or service of a copy of the response on the district

director. Requests for extensions of filing times must be submitted in writing with the reasons therefor and may be granted by the Board in its discretion. Oral argument may be heard before the Board in its discretion at such date and time as the Board may direct. The Board may approve or disapprove an application in whole or in part and shall inform the organization and the district director of the action taken with regard to an application. The accreditation of a representative shall be valid for a period of three years only; however, the accreditation shall remain valid pending Board consideration of an application for renewal of accreditation if the application is filed at least 60 days before the third anniversary of the date of the Board's prior accreditation of the representative. Accreditation terminates when the Boards recognition of the organization ceases for any reason or when the representatives employment or other connection with the organization ceases. The organization shall promptly notify the Board of such changes.

(e) *Roster*. The Board shall maintain an alphabetical roster of recognized organizations and their accredited representatives. A copy of the roster shall be furnished to the Commissioner and he shall be advised from time to time of changes therein.

APPENDIX H

Title 8: Aliens and Nationality

PART 1003 EXECUTIVE OFFICE FOR IMMIGRATION REVIEW.

Subpart A — Board of Immigration Appeals

§§1003.1 Organization, jurisdiction, and powers of the Board of Immigration Appeals.

(a)(1) *Organization*. There shall be in the Department of Justice a Board of Immigration Appeals, subject to the general supervision of the Director, Executive Office for Immigration Review (EOIR). The Board members shall be attorneys appointed by the Attorney General to act as the Attorney General to delegates in the cases that come before them. The Board shall consist of 15 members. A vacancy, or the absence or unavailability of a Board member, shall not impair the right of the remaining members to exercise all the powers of the Board.

(2) *Chairman*. The Attorney General shall designate one of the Board members to serve as Chairman. The Attorney General may designate one or two Vice Chairmen to assist the Chairman in the performance of his duties and to exercise all of the powers and duties of the Chairman in the absence or unavailability of the Chairman.

(i) The Chairman, subject to the supervision of the Director, shall direct, supervise, and establish internal operating procedures and policies of the Board. The Chairman shall have authority to:

(A) Issue operational instructions and policy, including Procedural instructions regarding the implementation of new statutory or regulatory authorities;

(B) Provide for appropriate training of Board members and staff on the conduct of their powers and duties;

(C) Direct the conduct of all employees assigned to the Board to ensure the efficient disposition of all pending cases, including the power, in his discretion, to set priorities or time frames for the resolution of cases; to direct that the adjudication of certain cases be deferred, to regulate the assignment of Board members ft cases, and otherwise to manage the docket of matters to be decided by the Board;

(D) Evaluate the performance of the Board by making appropriate reports and inspections, and take corrective action where needed;

(E) Adjudicate cases as a Board member; and

(F) Exercise such other authorities as the Director may provide.

(ii) The Chairman shall have no authority to direct the result of an adjudication assigned to another Board member or to a panel; provided, however, that nothing in this section shall be construed, to limit the management authority of the Chairman under paragraph (a)(2)(i of this section

(3) *Panels.* The Chairman shall divide the Board into three-member panels and designate a presiding member of each panel if the Chairman or Vice Chairman is not assigned to the panel The Chairman may from time to time make changes in the composition of such

panels and of presiding members. Each three-member panel shall be empowered to decide cases by majority vote, and a majority of the Board members assigned to the panel shall constitute a quorum for such panel. In addition, the Chairman shall assign any number of Board members, as needed, to serve on the screening panel to implement the case management process as provided in paragraph (e) of this section.

(4) *Temporary Board Members.* The Director may in his discretion designate immigration judges, retired Board members, retired immigration judges, and administrative law judges employed within, or retired from, EOIR to act as temporary Board members for terms not to exceed six months. In addition, with the approval of the Deputy Attorney General, the Director may designate one or more senior OIR attorneys with at least ten years of experience in the field of immigration law to act as temporary Board members for terms not to exceed six months. A temporary Board member shall have the authority of a Board member to adjudicate assigned cases, except that temporary Board members shall not have the authority to vote on any matter decided by the Board *en banc*.

(5) *En banc process.* A majority of the permanent Board members shall constitute a quorum for purposes of convening the Board *en banc*. The Board may on its own motion by a majority vote of the permanent Board members, or by direction of the Chairman, consider any case *en banc*, or reconsider as the Board *en banc* any case that has been considered or decided by a three-member panel. En banc proceedings are not favored, and shall ordinarily be ordered only where necessary to address an issue of particular importance

or to secure or maintain consistency of the Board's decisions.

(6) *Board Staff.* There shall also be attached to the Board such number of attorneys and other employees as the Deputy Attorney General, upon recommendation of the Director, shall from time to time direct.

(7) [Reserved]

(b) *Appellate jurisdiction.* Appeals may be filed with the Board of Immigration Appeals from the following:

(1) Decisions of Immigration Judges in exclusion cases, as provided in 8 CFR part 240, subpart D.

(2) Decisions of Immigration Judges in deportation cases, as provided in 8 CFR part 1240, subpart E, except that no appeal shall lie seeking review of a length of a period of voluntary departure granted by an Immigration Judge under section 244E of the Act as it existed prior to April 1, 1997.

(3) Decisions of Immigration Judges in removal proceedings, as provided in 8 CFR part 1240, except that no appeal shall lie seeking review of the length of a period of voluntary departure granted by an immigration judge under section 240B of the Act or part 240 of this chapter.

(4) Decisions involving administrative fines and penalties, including mitigation thereof, as provided in part 280 of this chapter.

(5) Decisions on petitions filed in accordance with section 204 of the act (except petitions to accord preference classifications under section 203(a)(3) or section 203(a) (6) of the act, or a petition on behalf of a child described in section 101(b)(1)(F) of the act), and

decisions on requests for revalidation and decisions revoking the approval of such petitions, in accordance with section 205 of the act, as provided in parts 204 and 205, respectively, of 8 CFR chapter I or parts 1204 and 1205, respectively, of this chapter.

(6) Decisions on applications for the exercise of the discretionary authority contained in section 212(d)(3) of the act as provided in part 1212 of this chapter.

(7) Determinations relating to bond, parole, or detention of an alien as provided in 8 CFR part 1236, subpart A.

(8) Decisions of Immigration Judges in rescission of adjustment of status cases, as provided in part 1246 of this chapter.

(9) Decisions of Immigration Judges in asylum proceedings pursuant to §12O8.2(b) of this chapter.

(10) Decisions of Immigration Judges relating to Temporary Protected Status as provided in 8 CFR part 1244.

(11) Decisions on applications from organizations or attorneys requesting to be included on a list of free legal services providers and decisions on removals there from pursuant to §1003.65

(12) Decisions of Immigration Judges on applications for adjustment of status referred on a Notice of Certification (Form I—290C) to the Immigration Court in accordance with §§§§i245.13(n)(2) and 1245.15(n)(3) of this chapter or remanded to the Immigration Court in accordance with § § 1245. 1B(d)(2) arid 1245. 15(e)(2) of this chapter.

(13) Decisions of adjudicating officials in practitioner

disciplinary proceedings as provided in subpart G of this part.

(14) Decisions of immigration judges regarding custody of aliens subject to a final order of removal made pursuant to §1241.14 of this chapter.

(c) *Jurisdiction by certification*. The Commissioner, or any other duly authorized officer of the Service, any Immigration Judge, or the Board may in any ease arising under paragraph (b) of this section certify such ease to the Board. The Board in its discretion may review any such case by certification without regard to the provisions of §§§1003.7 if it determines that the parties have already been given a fair opportunity to make representations before the Board regarding the case, including the opportunity request oral argument and to submit a brief.

(d) *Powers of the Board* — (1) *Generally*. The Board shall function as an appellate body charged with the review of those administrative adjudications under the Act that the Attorney General may by regulation assign to it. The Board shall resolve the questions before it in a manner that is timely, impartial, and consistent with the Act and regulations. In addition, the Board, through precedent decisions, shall provide clear and uniform, guidance to the Service, the immigration judges, and the general public on the proper interpretation and administration of the Act and its implementing regulations.

(i) The Board shall be governed by the provisions and limitations prescribed by applicable law, regulations, and procedures, and by decisions of the Attorney General (through review of a decision of the Board, by written order, or by determination and ruling pursuant

to section 103 of the Act).

(ii) Subject to these governing standards, Board members shall exercise their independent judgment and discretion in considering and determining the cases coming before the Board, and a panel or Board member to whom a case is assigned may take any action consistent with their authorities under the Act and the regulations as is appropriate and necessary for the disposition of the case.

(2) *Summary dismissal of appeals* — (i) *Standards.* A single Board member or panel may summarily dismiss any appeal or portion of any appeal in any case in which:

(A) The party concerned fails to specify the reasons for the appeal on Form EOIR—26 or Form EOIR—29 (Notices of Appeal) or other document filed therewith;

(B) The only reason for the appeal specified by the party concerned involves a finding of fact or a conclusion of law that was conceded by that party at a prior proceeding;

(C) The appeal is from an order that granted the party concerned the relief that had been requested;

(D) The Board is satisfied, from a review of the record, that the appeal is filed for an improper purpose, such as to cause unnecessary delay, or that the appeal lacks an arguable basis in fact or in law unless the Board determines that it is supported by a good faith argument for extension, modification, or reversal of existing law;

(E) The party concerned indicates on Form EOIR 26 or Form EOIR—29 that he or she will file a brief or statement in support of the appeal and, thereafter,

does not file such brief or statement, or reasonably explain his or her failure to do so, within the time set for filing;

(F) The appeal does not fall within the Board's jurisdiction, or lies with the Immigration Judge rather than the Board;

(G) The appeal is untimely, or barred by an affirmative waiver of the right of appeal that is clear on the record; or

(H) The appeal fails to meet essential statutory or regulatory requirements or is expressly excluded by statute or regulation.

(ii) *Action, by the Board.* The Boards ease management screening plan shall promptly identify eases that are subject to summary dismissal pursuant to this paragraph. An order dismissing any appeal pursuant to this paragraph (d)(2) shall constitute the final decision of the Board.

(iii) *Disciplinary consequences.* The filing by an attorney or representative accredited under §1292.2(d) of this chapter of an appeal that is summarily dismissed under paragraph (d)(2)(i) of this section may constitute frivolous behavior under §1003.102(j). Summary dismissal of an appeal under paragraph (d)(2)(i) of this section does not limit the other grounds and procedures for disciplinary action against attorneys or representatives.

(3) *Scope of review.* (i) The Board will not engage in *de novo* review of findings of fact determined by an immigration judge. Facts determined by the immigration judge, including findings as to the credibility of testimony, shall be reviewed only to

determine whether the findings of the immigration judge are clearly erroneous.

(ii) The Board may review questions of law, discretion, and judgment and all other issues in appeals from decisions of immigration judges *de novo*.

(iii) The Board may review all questions arising in appeals from decisions issued by Service officers *de novo*.

(iv) Except for taking administrative notice of commonly known facts such as current events or the contents of official documents, the Board will not engage in factfinding in the course of deciding appeals. A party asserting that the Board cannot properly resolve an appeal without further factfinding must file a motion for remand. If further factfinding is needed in a particular case, the Board may remand the proceeding to the immigration judge or, as appropriate, to the Service.

(4) *Rules of practice.* The Board shall have authority, with the approval of the Director, EQIR, to prescribe procedures governing proceedings before it.

(5) *Discipline of attorneys and representatives.* The Board shall determine whether any organization or individual desiring to represent aliens in immigration proceedings meets the requirements as set forth in §1292.2 of this chapter, It shall also determine whether any organization desiring representation is of a kind described in §§§1001.1(j) of this chapter, and shall regulate the conduct of attorneys, representatives of organizations, and others who appear in a representative capacity before the Board or the Service or any immigration judge.

(6) *Identity, law enforcement, or security investigations or examinations.* (i) The Board shall not issue a decision affirming or granting to an alien an immigration status, relief or protection from removal, or other immigration benefit, as provided in 8 CFR 1003.47(b), that requires completion of identity, law enforcement, or security investigations or examinations if:

(A) Identity, law enforcement, or security investigations or examinations have not been completed during the proceedings;

(B) DHS reports to the Board that the results of prior identity, law enforcement, or security investigations or examinations are no longer current under the standards established by DHS and must be updated; or

(C) Identity, law enforcement, or security investigations or examinations have uncovered new information bearing on the merits of the alien's application for relief.

(ii) Except as provided in paragraph (d)(6)(iv) of this section, if identity, law enforcement, or security investigations or examinations have not been completed or DHS reports that the results of prior investigations or examinations are no longer current under the standards established by DHS, then the Board will determine the best means to facilitate the final disposition of the case, as follows:

(A) The Board may issue an order remanding the case to the immigration judge with instructions to allow DHS to complete or update the appropriate identity, law enforcement, or security investigations

or examinations pursuant to §§§1003.47; or

(B) The Board may provide notice to both parties that in order to complete adjudication of the appeal the case is being placed on hold until such time as all identity. law enforcement, or security investigations or examinations are completed or updated and the results have been reported to the Board.

(iii) In any case placed on hold under paragraph (d)(6)(ii)(B) of this section, DHS shall report to the Board promptly when the identity, law enforcement, or security investigations or examinations have been completed or updated. If DHS obtains relevant information as a result of the identity, law enforcement, or security investigations or examinations, or if the applicant fails to comply with necessary procedures for collecting biometrics or other biographical information, DHS may move to remand the record to the immigration judge for consideration of whether, in view of the new information or the alien's failure to comply, the immigration relief should be denied, either on grounds of eligibility or, where applicable, as a matter of discretion.

(iv) The Board is not required to remand or hold a case pursuant to paragraph (d)(6)(ii) of this paragraph if the Board decides to dismiss the respondent's appeal or deny the relief sought.

(v) The immigration relief described in 8 CFR 1008.47(b) and granted by the Board shall take effect as provided in 8 CFR 1003.47(1).

(7) *Finality of decision*. The decision of the Board shall be final except in those cases reviewed by the Attorney General in accordance with paragraph (i) of this section. The Board may return a ease to the Service or

an immigration judge for such further action as may be appropriate, without entering a final decision on the merits of the case.

(e) *Case management system.* The Chairman shall establish a case management system to screen all cases and to manage the Board's caseload. Unless a case meets the standards for assignment to a three member panel under paragraph (e)(6) of this section, all cases shall be assigned to a single Board member for disposition. The Chairman, under the supervision of the Director, shall be responsible for the success of the case management system. The Chairman shall designate, from time to time, a screening panel comprising a sufficient number of Board members who are authorized., acting alone, to adjudicate appeals as provided in this paragraph.

(1) *Initial screening.* All cases shall be referred to the screening panel for review. Appeals subject to summary dismissal as provided in paragraph (d)(2) of this section should be promptly dismissed.

(2) *Miscellaneous dispositions.* A single Board member may grant an unopposed motion or a motion to withdraw an appeal pending before the Board. in addition, a single Board member may adjudicate a Service motion to remand any appeal from the decision of a Service officer where the Service requests that the matter be remanded to the Service for further consideration of the appellant's arguments or evidence raised on appeal; a case where remand is required because of a defective or missing transcript; and other procedural or ministerial issues as provided by the case management plan.

(3) *Merits review.* In any case that has not been

summarily dismissed, the case management system shall arrange for the prompt completion of the record of proceedings and transcript, and the issuance of a briefing schedule. A single Board member assigned under the case management system shall determine the appeal on the merits as provided in paragraph (e)(4) or (e)(5) of this section, unless the Board member determines that the case is appropriate for review and decision by a three-member panel under the standards of paragraph (e)(6) of this section. The Board member may summarily dismiss an appeal after completion of the record of proceeding.

(4) *Affirmance without opinion.* (i) The Board member to whom a case is assigned shall affirm the decision of the Service or the immigration judge, without opinion, if the Board member determines that the result reached in the decision under review was correct; that any errors in the decision under review were harmless or nonmaterial; and that

(A) The issues on appeal are squarely controlled by existing Board or federal court precedent and do not involve the application of precedent to a novel factual situation; or

(B) The factual and legal issues raised on appeal are not so substantial that the case warrants the issuance of a written opinion in the case

(ii) If the Board member determines that the decision should be affirmed without opinion, the Board shall issue an order that reads as follows: ""The Board affirms, without opinion, the result of the decision below. The decision below is, therefore, the final agency determination. *See* 8 CFR 3.1(e)(4).'" An order affirming without opinion, issued under authority of

this provision, shall not include further explanation or reasoning. Such an order approves the result reached in the decision below; it does not necessarily imply approval of all of the reasoning of that decision, but does signify the Boards conclusion that any errors in the decision of the immigration judge or the Service were harmless or nonmaterial.

(5) *Other decisions on the merits by single Board member.* If the Board member to whom an appeal is assigned determines, upon consideration of the merits, that the decision is not appropriate for affirmance without opinion, the Board member shall issue a brief order affirming, modifying, or remanding the decision under review, unless the Board member designates the case for decision by a three-member panel under paragraph (e)(6) of this section under the standards of the case management plan. A single Board member may reverse the decision under review if such reversal is plainly consistent with and required by intervening Board or judicial precedent, by an intervening Act of Congress, or by an intervening final regulation. A motion to reconsider or to reopen a decision that was rendered by a single Board member may be adjudicated by that Board member unless the case is reassigned to a three-member panel as provided under the standards of the case management plan.

(6) *Panel decisions.* Cases may only be assigned for review by a three-member panel if the case presents one of these circumstances:

(i) The need to settle inconsistencies among the rulings of different immigration judges;

(ii) The need to establish a precedent construing the meaning of laws, regulations, or procedures;

(iii) The need to review a decision by an immigration judge or the Service that is not in conformity with the law or with applicable precedents;

(iv) The need to resolve a case or controversy of major national import;

v) The need to review a clearly erroneous factual determination by an immigration judge; or

(vi) The need to reverse the decision of an immigration judge or the Service, other than a reversal under § 1008. i(e)(5).

(7) *Oral argument*. When an appeal has been taken, a request for oral argument if desired shall be included in the Notice of Appeal. A three-member panel or the Board en bane may hear oral argument, as a matter of discretion, at such date and time as is established under the Boards case management plan. Oral argument shall be held at the offices of the Board unless the Deputy Attorney General or his designee authorizes oral argument to be held elsewhere. The Service may be represented before the Board by an officer of the Service designated by the Service. No oral argument will be allowed in a case that is assigned for disposition by a single Board member

(8) *Timeliness.* As provided under the case management system, the Board shall promptly enter orders of summary dismissal, or other miscellaneous dispositions, in appropriate cases. In other cases, after completion of the record on appeal, including any briefs, motions, or other submissions on appeal, the Board member or panel to which the case is assigned shall issue a decision on the merits as soon as practicable, with a priority for cases or custody appeals involving detained aliens.

(i) Except in exigent circumstances as determined by the Chairman, or as provided in paragraph (d)(6) of this section, the Board shall dispose of all appeals assigned to a single Board member within 90 days of completion of the record on appeal, or within 180 days after an appeal is assigned to a three-member panel (including any additional opinion by a member of the panel).

(ii) In exigent circumstances, the Chairman may grant an extension in particular cases of up to 60 days as a matter of discretion. Except as provided in paragraph (e)(8)(iii) or (iv) of this section, in those cases where the panel is unable to issue a decision within the established time limits, as extended, the Chairman shall either assign the ease to himself or a Vice- Chairman for final decision within 14 days or shall refer the case to the Attorney General for decision. If a dissenting or concurring panel member fails to complete his or her opinion by the end of the extension period, the decision of the majority will be issued without the separate opinion.

(iii) In rare circumstances, when an impending decision by the United States Supreme Court or a United States Court of Appeals, or impending Department regulatory amendments, or an impending en banc Board decision may substantially determine the outcome of a case or group of cases pending before the Board, the Chairman may hold the case or cases until such decision is rendered, temporarily suspending the time limits described in this paragraph (e)(8).

(iv) For any case ready for adjudication as of September 25, 2002, and that has not been completed within the established time lines, the Chairman may, as a matter of discretion, grant an extension of up to 120 days.

(v) The Chairman shall notify the Director of EOIR and the Attorney General if a Board member consistently fails to meet the assigned deadlines for the disposition of appeals, or otherwise fails to adhere to the standards of the case management system. The Chairman shall also prepare a report assessing the timeliness of the disposition of cases by each Board member on an annual basis.

(vi) The provisions of this paragraph (e)(8) establishing time limits for the adjudication of appeals reflect an internal management directive in favor of timely dispositions, but do not affect the validity of any decision issued by the Board and do not, and shall not be interpreted to, create any substantive or procedural rights enforceable before any immigration judge or the Board, or in any court of law or equity.

(f) *Service of Board decisions.* The decision of the Board shall be in writing and copies thereof shall be transmitted by the Board to the Service and a copy shall be served upon the alien or party affected as provided in part 292 of this chapter.

(g) *Decisions as precedents.* Except as Board decisions may be modified or overruled by the Board or the Attorney General, decisions of the Board, and decisions of the Attorney General, shall be binding on all officers and employees of the Department of Homeland Security or immigration judges in the administration of the immigration laws of the United States. By majority vote of the permanent Board members, selected decisions of the Board rendered by a three member panel or by the Board en bane may be designated to serve as precedents in all proceedings involving the same issue or issues. Selected decisions designated by the Board, decisions of the Attorney General, and

decisions of the Secretary of Homeland Security to the extent authorized in paragraph (1) of this section, shall serve as precedents in all proceedings involving the same issue or issues.

(h) *Referral of cases to the Attorney General.* (1) The Board shall refer to the Attorney General for review of its decision all cases that:(i) The Attorney General directs the Board to refer to him. (ii) The Chairman or a majority of the Board believes should be referred to the Attorney General for review. (iii) The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, refers to the Attorney General for review.

(2) In any case the Attorney General decides, the Attorney General's decision shall be stated in writing and shall be transmitted to the Board or Secretary, as appropriate, for transmittal and service as provided in paragraph (f) of this section.

(i) *Publication of Secretary's precedent decisions.* The Secretary of Homeland Security, or specific officials of the Department of Homeland Security designated by the Secretary with the concurrence of the Attorney General, may file with the Attorney General decisions relating to the administration of the immigration laws of the United States for publication as precedent in future proceedings, and, upon approval of the Attorney General as to the lawfulness of such decision, the Director of the Executive Office for Immigration Review shall cause such decisions to be published in the same manner as decisions of the Board and the Attorney General.

(j) *Continuation of jurisdiction and procedure.* The

jurisdiction of, and procedures before, the Board of Immigration Appeals in exclusion, deportation, removal, rescission, asylum-only, and any other proceedings, shall remain in effect as in effect on February 28, 2003, until the regulations in this chapter are further modified by the Attorney General. Where a decision of an officer of the Immigration and Naturalization Service was, before March 1, 2003, appealable to the Board or to an immigration judge, or an application denied could be renewed in proceedings before an immigration judge, the same authority and procedures shall be followed until further modified by the Attorney General.

APPENDIX I

SUPPLEMENTAL AFFIDAVIT OF CHRISTA FAREED BAUER

COMES NOW, Christa Fareed Bauer, who states upon her oath that the following is true and correct to the best of her knowledge:

1. That my name is Christa Fareed Bauer. I live at 311 NE 95th Terrace, #212, Kansas City, MO 64155. My telephone number is 816-914-3982. I am of legal age to make this sworn statement.

2. On September 8, 2006, I fully executed my attached affidavit marketed with a A-1, all of which was and is true and correct to the best of my knowledge.

3. In reviewing said affidavit, I note that my statement at paragraph number 11 thereof was and is incomplete.

4. Paragraph number 11 of my affidavit A-1 states as follows:

Frankly, Ms. Omazic doesn't recall my mentioning my upcoming Hearing on November 28, 2005, with the judge, but i definitely told her about my hearing. There must be misunderstanding with her on this point.

5. The following should be added to the above paragraph to explain the "misunderstanding."

A. When my husband and I visited the Volag Ms. Omazic in early November, 2005, to sign our I-130/I-485 petition for her to file (which was filed by her efforts on November 17, 2005) she distinctly told us that I did not have to appear at the hearing before the Immigration Court on November 28, 2005.

B. That was because the Volag stated to the both of us that she would file our adjustment of status papers, well before the November 28, 2005 hearing date, and that such filing would automatically cancel said hearing including my need to be present at the hearing.

6. The proceeding paragraph number five which supplements my original affidavit, attachment A-1, understandably clarifies the "misunderstanding with" the Volag, when the above supplemental paragraphs are read in conjunction and inserted just before the following paragraph number 12 in my original affidavit, which states as follows:

Most important Omazic wrote the USCIS to cancel Application on November 9, 2005, but unfortunately, it had already been denied. In other words, I believe Ms. Omazic meant to write to the Judge to cancel my Hearing because of the I-130/I-485 Petition.

7. Further, my statement in my original affidavit at paragraph number 15 states as follows:

> On March 14, 2006, a USCIS Decision was sent to Ms. Omazic c/o the JVS stating my "Application to Adjust Status had been closed, and I was "the subject of a final removal order."

8. The following should be added to supplement and clarify the immediate paragraph:

> A. Affiant actually received a copy the USCIS decision of March 14, 2006, (attachment A-I) from the Volag on or about April 3, 2006.

9. The supplemental information supplied herein also paragraphs number five and eight should be considered as Exhibit A-2.

10. Further, affiant states she paid the Volag approximately $400 for her professional services in this matter along with about $750 USCIS filing fees.

11. Affiant further states that she has never received a copy of the Order of the Immigration Judge resulting from her in absentia hearing on November 28, 2005, and is uncertain to the exact wording of it.

12. Attachment A-3, herewith is my complete affidavit combining, in order all elements of A-1 and A-2 as described herein.

Further Affiant Sayeth Naught.

/s/ Christa Fareed-Bauer

Christa Fareed-Bauer

STATE OF MISSOURI)

) ss.

COUNTY OF JACKSON)

Now, on January 26, 2007, Christa Fareed Bauer personally appeared before me a notary public, and swore and affirmed the foregoing statements were true and correct.

/s/ Tammy Peery

Notary Public

My commission expires:

APPENDIX J

JVS

November 09, 2005

US Department of Homeland Security
US Citizenship and Immigration Service
ASYLUM OFFICE
427 South LaSalle Street
Chicago, IL 60605

RE: CHRISTA FAREED BAUER (a.k.a) CHRISTA BAUER A#097 597 220

Dear Sir or Madam,

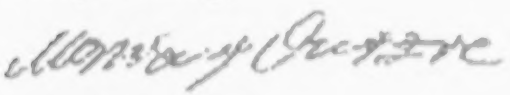
I am writing this letter to inform you that Mr. FAREED BAUER Christa hired me to represent her in her application to change and adjust her status through the marriage with her US Citizen husband Mr. FAREED Qasim.

She informed me of previous application from I-589 asylum application and asked me to write this letter as her noted representative to request that her asylum application please be withdrawn. Attached is the copy of completed and signed from G-28 for your records and we please

request that you kindly withdraw Mrs. FAREED BAUER application for asylum since she is applying for a different immigration benefit through her US Citizen spouse.

Thank you for your time and attention to this matter.

Respectfully,



Marianna Omazic
BIA Accredited

1608 Baltimore, Kansas City, Missouri
64108
(816) 471-2808 / TTY (816) 471-7461 /
FAX (816) 471-2930
www.jvskc.org

APPENDIX K

U.S. Citizenship and Immigration Services
2797C, Notice of Action

THE UNITED STATES OF AMERICA

Receipt Number: MSC-06-052-18560		Case Type: I-485 – Application to Register Permanent Residence or Adjust Status
Received Date: November 17, 2005	Priority Date:	Applicant: A097597220 FARED BAUER, CHRISTA
Notice Date: November 23, 2005	Page 1 OF 1	ASC Code: 3

MARIANNA OMAZIC JVS 1608 BALTIMORE KANSAS CITY, MO 64108	Notice Type: Receipt Notice Amount Received: $395.00

The above application has been received. Please notify us immediately if any of the above information is incorrect. If you find necessary to contact this office in writing, you must include a copy of this receipt notice with your inquiry.

BIOMETRICS –
The next step is to have your biometrics taken, if required, at a US Citizenship and immigration Service (USCIS)
Application Support Center (ASC).

PLEASE NOTE –
USCIS WILL SCHEDULE YOUR BIOMETRICS APPOINTMENT. You will be receiving an appointment notice with a specific time, date and place where you will have your fingerprints and/or photos taken.

WHAT TO BRING TO Your appointment –
Please bring this letter and your photo identification to your appointment. Acceptable kinds of photo identification are:

a passport or national photo identification issued by your country,
a driver's license,
a military photo identification, or
a store-issued photo identification card.

If you do not bring this letter and photo identification, we cannot process you.
Please bring a copy of all receipt notices received from USCIS in relation to your current application for benefits.

CASE STATUS

Information about your local office processing times may be obtained by calling the NCSC at 1-800-375-5283.

If you have internet access, you can visit the United States Citizenship and Immigration Services website at www.USCIS.gov where you can find valuable information about forms, filing instructions, and immigration services and benefits.

U.S. Citizenship and Immigration Services
P.O. Box 648005
Lee's Summit, MO 64064
National Customer Service Center: 1-800-375-5283

APPENDIX L

U.S. Citizenship and Immigration Services
I-797C, Notice of Action

THE UNITED STATES OF AMERICA

ASC Appointment Notice	Application Number	NOTICE DATE
	MSC0605218560 MSC0605218563	1/20/2006

CASE TYPE	SOCIAL SECURITY NUMBER
1485 1765	

USCIS A#
A097597220

CODE
3

TCR	SERVICE CENTER	PAGE
	MSC	1 OF 1

CHRISTA FAREED BAUER
c/o MARIANNA OMAZIC

JVS 1608 BALTIMORE
KANSAS CITY, MO 64108

To process your application, the U.S. Citizenship & Immigration Services (USCIS) must capture your biometrics.

PLEASE APPEAR AT THE BELOW APPLICATION SUPPORT CENTER AT THE DATE AND TIME SPECIFIED.
IF YOU FAIL TO APPEAR AS SCHEDULED, YOUR APPLICATION WILL BE CONSIDERED ABANDONED.

APPLICATION SUPPORT CENTER
USCIS KANSAS CITY
747 N. CONANT AVENUE
KANSAS CITY, MO 64153

DATE AND TIME OF APPOINTMENT
02/10/2006
2:00 PM

THEN YOU GO TO THE APPLICATION SUPPORT CENTER TO HAVE YOUR BIOMETRICS TAKEN, YOU MUST BRING; THIS APPOINTMENT NOTICE AND PHOTO IDENTIFICATION.
Nationalization applicants must bring their Alien Registration Card. All other applicants must bring a passport Driver's license, national ID, military ID, or State-issued photo ID. If you appear without proper identification, your biometrics may not be taken

APPPLICATION NUMBER:
1485 MSC0605218560

APPLICATION NUMBER:
1765 MSC0605218563

If you have any questions regarding this notice, please call 1-800-375-5283

WARNING!

Due to limited seating availability in our lobby area, only persons who are necessary to assist with transportation or completing the biometrics ???sheet should accompany you.

You have open wounds or bandages/casts when you appear, the USCIS may reschedule you appointment if it is determined your injuries will ??? with taking your biometrics.

APPENDIX M

U.S. Citizenship and Immigration Services
797C, Notice of Action

THE UNITED STATES OF AMERICA

REQUEST FOR APPLICANT TO APPEAR FOR
INITIAL INTERVIEW
NOTICE DATE
FEBRUARY 27, 2006

CAST TYPE
FORM I-485, APPLICATION TO REGISTER
PERMANENT RESIDENCE OR ADJUST STATUS

AS
A 097 597 220

APPLICATION NUMBER
MSC0605218560

RECEIVED DATE
November 17, 2005

PRIORITY DATE
November 17, 2006

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1 of 1

CHRISTA FAREED BAUER
c/o MARIANNA OMAZIC
JVS 1608 BALTIMORE
KANSAS CITY, MO 64108

You are hereby notified to appear for the interview appointment, as scheduled below, for the completion of your Application to Register Permanent Residence or Adjust Status (Form I-485) and any supporting applications or petitions. *Failure to appear for this interview and/or failure to bring the below listed items will result in the dental of your application. (8 CFR 103.2(b)(13))*

Who should come with you?

- ☐ If your eligibility is based on your marriage, your husband or wife must come with you to the interview.
- ☐ If you do not speak English fluently, you should bring an interpreter.
- ☐ Your attorney or authorized representative may come with you to the interview.
- ☐ If your eligibility is a based on a parent/child relationship and the child is minor, the petitioning parent and the child must appear for the interview.

NOTE: Every adult (over 18 years of age) who comes to the interview must bring Government-issued photo identification, such as a driver's license or ID card, in order to enter the building and to verify his/her identity at the time of the interview. You do not need to bring your children unless otherwise instructed. Please be on time, but do not arrive more than 45 minutes early. We may record or videotape your interview.

YOU MUST BRING THE FOLLOWING ITEMS WITH YOU: (Please use as a checklist to prepare for your interview)

- ☐ This interview Notice and your Government

issued photo identification.

- ☐ A completed medical examination (Form 1-693) and vaccination supplement in a sealed envelope (unless already submitted).
- ☐ A completed Affidavit(s) of Support (Form 1-864) with all required evidence, including the flowing, for each of your sponsors (unless already submitted);
    - ☐ Federal Income Tax returns and W-Z's; or certified IRS printouts, for the past 3 years;
    - ☐ Letters from each current employer, verifying current rate of pay and average weekly hours, and pay stubs for the past 2 months;
    - ☐ Evidence of your sponsors and/or co-sponsor's United States Citizenship or Lawful Permanent Resident Status
- ☐ All documentation establishing your eligibility for Lawful Permanent Resident status.
- ☐ Any immigration-related documentation ever issued to you, including any Employment Authorization Document (EAD)and any Authorization for Advance Parole (Form I-512).
- ☐ All travel documents used to enter the United States, including Passports, Advance Parole documents (I-512) and I-94s (Arrival/Departure Document).
- ☐ Your Birth Certificate
- ☐ Your petitioner's Birth Certificate and your petitioner's evidence of United States Citizenship or Lawful Permanent Resident Status.
- ☐ If you have children bring a Birth Certificate for each of your children.
- ☐ If your eligibility is based on your marriage, In

addition to your spouse coming to the interview with you bring:

- ☐ A certified copy of your Marriage Document issued by the appropriate civil authority.
- ☐ Your spouse's Birth Certificate and your spouse's evidence of United States Citizenship or Lawful Permanent Resident Status;
- ☐ If either you or your spouse were ever married before, all divorce decrees/death certificate for each prior marriage/former spouse;
- ☐ Birth Certificates for all children of this marriage, and custody papers for your children and for your spouse's children not living with you:

☐ Supporting evidence of your relationship, such as copies of any documentation regarding joint assets or liabilities you and your spouse may have together. This may include: tax returns, bank statements, insurance documents (car, life, health), property documents (car, house, etc.) rental agreements, utility bills, credit cards, contracts, leases, photos, correspondence and/or any other documents you feel may substantiate your relationship.

☐ Original and copy of each supporting document that you submitted with your application. Otherwise, we may keep your originals for our records.

☐ If you have ever been arrested, bring the related Police Report and the original or certified Final Court Disposition for each arrest, even if the charges have been dismissed or expunged. If no

court record is available, bring a letter from the court with jurisdiction indicating this.

- ☐ A certified English translation for each foreign language document. The translator must certify that s/he is fluent in both languages, and that the translation in its entirely is complete and accurate.

YOU MUST APPEAR FOR THIS INTERVIEW.
If an emergency, such as your own illness or a close relative's hospitalization, prevents you from appearing, call the U.S. Citizenship and Immigration Services (USCIS) National Customer Service Center at 1-800-375-6283 as soon as possible. Please be advised that rescheduling will delay processing of application/petition, and may require some steps to be repealed. It may also affect your eligibility for other immigration benefits while this application is pending.

If you have questions, please call the USCIS National Customer Service Center at 1-800-375-5283 (hearing impaired TDD service is 1-800-767-1833).

PLEASE COME TO: U.S. Citizenship and
Immigration Services
9747 Northwest Conant Ave.
Lobby
Kansas City, MO 64153
REPRESENTATIVE COPY

ON: Monday, April 24, 2006
AT: 01:30 PM

REPRESENTATIVE COPY

APPENDIX N

THE UNITED STATES OF AMERICA

NOTICE OF INTERVIEW CANCELATION BY CIS

NOTICE DATE
April 10, 2006

CASE TYPE
FORM 3-485, APPLICATION TO REGISTER PERMANENT RESIDENCE OR ADJUST STATUS

AS
A 097 597 220

APPLICATION NUMBER
MSC0605218560

RECEIVED DATE
November 17, 2005

PERIORITY DATE
November 17, 2005

PAGE
1 of 1

APPLICANT NAME AND MAILING ADDRESS
CHRISTA FAREED BAUER
c/o MARIANNA OMAZIC
JVS 1608 BALTIMORE
KANSAS CITY, MO 64108

This is to advise you that, due to unforeseen circumstances, we have canceled the previously scheduled interview on Monday, April 24, 2006 at 01:30 PM for the above applicant. We regret any inconvenience this may cause. You will be notified of any further action taken on this case, including any rescheduled interview information, under separate notice.

If you have any questions or comments regarding this notice or the status of your case, please contact us at the address or customer service number below:

Office Address:

U.S. CITIZENSHIP AND IMMIGRATION SERVICES
P.O. BOX 648005
LEE'S SUMMIT, MO 64064

Customer Service Number:

CIS National Customer Service Center:
1-800-375-5283

For TDD Hearing Impaired Assistance:
1-800-767-1833

REPRESENTATIVE COPY

APPENDIX O

BIA RECOGNITION AND ACCREDITATION

A Step-by-Step Guide for

Non-Profit Community-Based Agency Staff:

Applying for Agency Site Recognition and

Agency Staff/Volunteer Accreditation From

The Board of Immigration Appeals

September, 2007

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Section I What is the Board of Immigration Appeals BIA), Office Recognition, and Agency Staff/Volunteer

Accreditation?

Section II What Is the Process for Applying for BIA Agency Site Recognition and Agency Staff/Volunteer

Accreditation at the same time?

Information on Applying for Recognition for Agency site

Information on Applying for Accreditation for Agency Staff/Volunteer

Section III What Is the Process for Applying for Agency Staff/Volunteer Accreditation if the Agency Site Is Recognized?

Section IV Where and How Do I Mail the Application?

Section V Applying for Renewal of Agency Staff/Volunteer Accreditation

Key to Symbols

Checklist box for item that must be completed.

Section I

What Is the Board of Immigration Appeals (BIA), Agency Site Recognition,

And Agency Staff/Volunteer Accreditation?

The Board of Immigration Appeals (BIA), located in Falls Church, VA, is part of the United States Department of Justice. The BIA, among other duties, handles applications for agency site recognition and agency staff/volunteer accreditation of non-lawyers to represent immigrants.

Unless an office has an attorney on staff, each office location must be recognized by the BIA as an organization, and have at least one accredited representative on staff, in order to legally be providing immigration legal services. The attorney(s) or BIA representative(s) should be the individual(s) who are filling out immigration forms, practicing immigration law and supervising any non-BIA representatives who are also assisting the offices immigration department.

Office recognition (barring unusual circumstances) does not expire. Personal accreditation does expire after three years and needs to be renewed. An accredited representative is **only** authorized to assist clients at the recognized sites of the organization at which s/he is accredited. An accredited representative may be full-time, part-time, or a volunteers He or she may even become accredited at more than one agency

There are two types of accreditation:

Partial accreditation allows the representative to counsel immigration clients, complete immigration forms, and represent clients before the Citizenship and Immigration Service (CIS). The partially accredited representative can fill out CIS forms and accompany clients to 015 interviews.

Full accreditation allows the representative to do everything that a partially accredited representative can do, and represent clients before the Executive Office for Immigration Review (FOIR). EOIR is composed of the Immigration Courts and the Board of Immigration Appeals. Therefore, a fully accredited representative can also represent clients in removal, summary removal, rescission and other proceedings in immigration court. He or she may handle appeals to the BIA. However full accreditation does not permit a representative to represent anyone before state courts, the federal Courts of Appeals, or the U.S. Supreme Court.

For more information on BIA recognition and accreditation, including a current roster of BIA-recognized offices and accredited representatives, see http://www.usdoi.gov/eoir/press/05/AccreditationFact

Sheet2005.htm

This step-by-step guide is broken up into separate sections, depending on whether you are applying for your office's recognition and staff accreditation (Section II), or only staff accreditation (Section III) or renewal (Section IV).

Section II

What Is the Process for Applying for BIA Agency Site Recognition While Applying for Agency Staff/Volunteer Accreditation?

(If your office is already recognized and you are just applying for new or renewing staff, skip to section III below.)

To be recognized by the BIA, an organization must have established that it has adequate knowledge and experience to provide immigration legal services, and that it charges or accepts only nominal fees for those services.

The focus in this section is to prove that your office has experience in immigration law as well as resources and access to resources, including both law libraries and electronic information, and access to other immigration experts.

The Application must include all of the following required elements.

A. Information on Office Applying for Recognition

Cover Letter and Table of Contents

Include a cover letter describing the attached application, with a table of contents, (The table of contents may be included in the letter itself, or on a separate page.)

The cover letter will need to be from the supervisor of the applicant(s) applying for individual accreditation. For example, if the director is not applying for accreditation, the director should sign the cover letter. However, if the director is applying, his/her supervisor should sign, If a director is applying, the chair of the board of directors should sign.

The cover letter should explain that the application is for the office as well as list any staff who is applying for accreditation, so it is a basic outline of the whole application. The supervisor of each staff member will also write a separate letter of recommendation (discussed below).

The EOIR-31 form.

Print out and complete this form from the EOIR website, at:

http://www.usdojgov/eoir/eoirforms/instru31.htm. It may be filled in online and printed out.

The EOIR form is used for single offices. For more than one office within an agency, you must complete and submit an additional application per office.

Applicants must be a non-profit agency and mark this answer on question 3.

The same individual who wrote the cover letter should sign the EOIR-31 application at the bottom of the page.

On page two, fill in the appropriate addresses for CIS and ICE, as described in Section IV below on, A Where and How Do I Mail the Application?

The individual who is actually mailing the application needs to sign and date, indicating when s/he mailed the application.

Articles of Incorporation

Internal Revenue Service (IRS) 501(3) (c) Letter

Organizational Chart for the Office

This may list the staff in the office and the office=s connection to the other offices if your agency has more than one office. Of greatest importance is to show the chain of supervision of the person(s) who will be providing legal immigration services.

Office Description and Brochure (if available)

If you have a brochure, attach that. If the immigration program has a separate brochure, attach that as well.

List of Proposed Fees if your agency will be charging fees

List of Office's Funding Sources

This is a minimal document listing the amounts and sources of funding for your agency. Most agencies will list the grants they receive and any fees they take in. Do not submit a budget and do not submit an audit. To reiterate, this is a very basic list of agency financial support.

List of Immigration Legal Resources Available to the Office

Because we use the Internet so frequently now in our work, it is imperative that you mention the types of legal immigration information you find and utilize online (especially if your own law library is small).

List of Law Libraries Available to the Office

List any local law libraries to which your office has access, including but not limited to, law schools, city/county/state law libraries, or law libraries of law firms or other non-profit agencies.

B. Information on Individual Applying for Accreditation

This information must be included with a joint recognition and accreditation application, in addition to the information in Section A on office information.

Resume of Individual Applying for Accreditation

Resumes should include the individual=s education and work experience, including immigration experience. They should also list the types of immigration forms the individual has worked on, by form number and title (for example: I-360, Petition for Amerasian, Widow(er), or Special Immigrant). Include in the trainings section information on the dates, sponsoring agencies, and locations of all immigration law and practice trainings the individual has attended. The resume should also list any languages the individual speaks, as well as mentioning the Individual=s experience working with people from different countries. It is a good idea to include any community service the applicant has performed, regardless of its direct relevance to BIA.

Certificates and Agendas of Trainings Individual Has Attended

It is ideal to include both the agendas and certificates (if received) for all trainings. However, both may not be available, If neither is available, include a short description of the training in the resume.

Letters of Recommendation

Note that if you are applying for office recognition and individual accreditation, you need letters of recommendation for the office=s recognition and the individual=s accreditations These letters can speak to both recognition and accreditation, or one or the others For example, some recommenders will be familiar with the office hut not the individual, and some may by familiar with the individual but less familiar with the office overall.

It is recommended that you obtain letters of recommendation from the supervisor of the individual applying for accreditation and a local immigration law practitioner who is familiar with the applicant's immigration legal skills and knowledge, i.e., a BIA accredited representative or an attorney. If applying for recognition at the same time, obtain a letter or two from outside sources recommending recognition and/ or accreditation.

Letters most often come from other local non-profit agencies or immigration legal services programs, other agencies in the community that work with the office (such as other domestic violence/sexual assault agencies and coalitions, immigration coalitions, local law enforcement and courts, departments of human services or local hospitals), Senators or Members of Congress, or other public officials serving the

community. These letters must attest to the fact that this agency is actively assisting the community.

Section III

What Is the Process for Applying for Accreditation if the Office is Already Recognized?

Once the office is recognized, it remains recognized forever, unless the BIA revokes recognition due to severe problems with the office or if the office notifies the BIA that it has closed the office or immigration department. Office recognition does not need to be renewed.

An office can apply to add more individually accredited representatives at any time. The process is much simpler than applying for office recognition as well as well as accreditation.

Cover Letter and Table of Contents

Include a cover letter describing the attached application, with a table of Contents. (The table of contents may he included in the letter itself, or on a separate page.)

The cover letter will need to be from the supervisor of the applicant(s) applying for individual accreditation. This could be the agency or program director or the chair of the board of directors.

The cover letter should state the date on which the office became recognized and also should name the individual(s) who are applying for accreditation.

Resume of Individual Applying for Accreditation

The resume should include the individual's education and work experience, including immigration experience. It should also list the types of immigration forms the individual has worked on, by case number and title (for example: 1-130, Petition for Alien Relative). The resume should also list the titles, dates, sponsoring agencies, and locations of all immigration trainings the individual has attended. The resume should also list any languages the individual speaks, as well as mentioning the individual=s experience working with people from different countries.

Certificates and Agendas of Trainings Individual Has Attended

It is ideal to include both the agendas and certificates (if received) for all trainings However, both may not be available, If neither is available, include a short description of the training in the resume.

Letters of Recommendation

Obtain letters of recommendation from the individual's supervisor and an immigration practitioner such as a BIA accredited representative or attorney who is familiar with the applicant's immigration legal work.

Outside letters most often come from other resettlement agencies or immigration legal services programs, other agencies in the community that work with the office (such as immigration coalitions, local law enforcement, departments of human services or local hospitals), Senators or Members of Congress, or other public officials serving the community.

Certificates of Service

If you are applying for individual accreditation alone, you must prepare a certificate of service to ICE and CIS. (This is incorporated in the OIR-8i application for new office recognition.) Follow the directions in Section IV on where to send the application copies and how to complete the certificate of service,

Section IV

Where and How

Do I Mail the Application?

Regardless of whether you are applying for an office and individuals, or an individual alone, you must follow the same mailing process. Please review this process very carefully. If you do not follow it exactly, the BIA will return your application to you without reviewing it.

Your complete application includes proof of service on CIS and ICE. For new office applications, this proof of service is part of form EOIR-31. For staff applications/renewals, this will he the separate proof of service form you create.

Make FOUR copies of the original application (including proof of service), so that you have a total of FIVE.

1. Mail the original by certified mail, return receipt requested to:

Recognition and Accreditation Program Coordinator

Executive Office for Immigration Review

Board of Immigration Appeals

P.O. Box 8530

5107 Leesburg Pike, Suite 2400

Falls Church, VA 22041

2. Mail a copy of the application by certified mail, return receipt requested, to the Special Agent in Charge for Immigration Customs and Enforcement for your state.

a. To find the Special Agent for your state, you will need to go to two links on the ICE website.

b. First go to this page and find which ICE district your state is in.

http ://www.ice.gov/about/contact.htm

Then go to the link for the Special Agent in Charge (SAC), and find the SAC office for the district you have identified. http://www.ice.gov/about/investigations/contact.htm.

d. Mail the copy to ICE to the address in letter c.

For example, I work in North Carolina, so I go to http://www.ice.gov/about/dro/contact.htm

and find out that the ICE field office for my state is Atlanta. Then I go to the Special Agent site at http://www.ice.gov/about/investigations/contact.htm and find out that I mail my application to:

ICE SAC Atlanta

1691 Phoenix Boulevard, Suite 250

Atlanta, GA 30849

(Note that this is a different address than the regular ICE field office.)

3. Mail a copy of the application by certified mail, return receipt requested, to the district director at the district office of Citizenship and Immigration Services for your state.

Go to www.uscis.gov and click on Services and Benefits, then Field Offices.

Find the district office for your city/state, not the sub office.

c. Send a copy of the application to the district office.

For example, I work in North Carolina. My sub-office is in Charlotte, but I must send my application to the district office in Atlanta at:

District Director

USCIS Atlanta District

Martin Luther King, Jr., Federal Building
77 Forsyth Street SW
Atlanta, GA 30303

Keep a copy for your office.

5. Send a copy to your national or state network coordinator.

Section V

Applying for Renewal Of Agency Staff/Volunteer Accreditation

An individual who is accredited must file an application to renew accreditation every three years. If an application for renewal is filed at least 60 days before the end of the third year, accreditation will remain valid pending the BIA s consideration of the application. This requires the agency to send it in some way that it can document that the BIA received it before the 60 day period. Most programs send it certified mail, return receipt requested.

If the individual does not apply on time, his or her accreditation ends and s/he is no longer authorized to practice immigration law. Therefore it is vital that representatives renew on time. S/he will not be eligible to engage in the authorized practice of law until their accreditation application is granted.

If there is no representative who is currently accredited on staff, that office is not authorized to practice immigration law because at least one accredited representative is required (even though the office remains recognized). If an individual does not apply on time, s/he must file a new application as soon as possible.

The renewal application should state the last time that the individual was accredited (the first time, or the last renewal). It is important to indicate if the individual has received additional experience (e.g., more types of cases or more complex cases) and training.

While there is no set requirement that additional training was received since the last accreditation

period, the individual should show some ongoing training. The industry standard is 20-40 hours of immigration law training/year. This training can be in-' person, via audio tape, or by accessing archived materials on internet immigration law websites.

Resume of Individual Applying for Accreditation

The resume should include the individual=s education and work experience, including immigration experience. It should also list the types of immigration forms the individual has worked on, by ease number and title (for example: I-130, Petition for Alien Relative). The resume should also list the titles, dates, sponsoring agencies, and locations of all immigration trainings the individual has attended. The resume should also list any languages the individual speaks, as well as mentioning the individual=s experience working with people from different countries. It is helpful to include any community service the applicant has performed, Include the applicant's supervisor and someone who is a BIA accredited representative or attorney or in law enforcement as references.

Make sure that the resume lists when the individual first became BIA-accredited.

Certificates and Agendas of Trainings Individual Has Attended

It is only necessary to include copies of certificates and agendas for trainings that have occurred since the last accreditation period. It is ideal to include both the agendas and certificates (if received) for all recent trainings. However, both may not be available. If neither is available, include a short description, of

the training in the resume.

Letters of Recommendation

Letters of recommendation are not required, but can strengthen your renewal application. For example, you may wish to obtain letters of recommendation from the individual=s supervisor and someone such as a BIA accredited representative or immigration attorney who is familiar with the applicant's legal work since the agency received BIA accreditation.

Prepared by Amy J. Bliss, Immigration Legal Services Staff Attorney,

World Relief, 443-451-1992; abliss@wr.org

Edited and Updated by Jack Holmgren, Field Office Attorney, Catholic Legal Immigration Network, 415-394-8074: jholmren@clinielegal.org

Last Updated 9-14-07

APPENDIX P

(USDOJ SEAL] **U.S. Department of Justice**

Executive Office for Immigration Review

FY 2009

Statistical Year Book

Prepared by the Office of Planning, Analysis, & Technology

March 2010

Contact Information

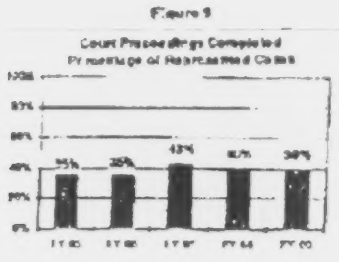
Office of Legislative and Public Affairs
5107 Leesburg Pike, Suite 1902
Falls Church, VA 22041
(703) 305-0289
(703) 605-0365 (fax)

Immigration Courts: Proceedings Completed by Representation Status

The Immigration and Nationality Act states that individuals in removal proceedings before an immigration judge may be represented by counsel, but at no expense to the government. Prior to representing an alien before the immigration court, representatives must file a Notice of Appearance with the court

Many individuals in removal proceedings are indigent and cannot afford a private attorney. Some seek free or pro bongo representation, while others proceed without counsel on their own, or *pro se*. Of great concern to EOIR is the large number of individuals appearing prose. Immigration judges, in order to ensure that such individuals understand the nature of the proceedings, as well as their rights and responsibilities, must take extra care and spend additional time explaining this information, An individual. may ask for a continuance of a proceeding to obtain counsel.

As shown in Figure 9, less than half of the aliens whose proceedings were completed during the period FY 2005 to FY 2009 were represented. The percentage of represented aliens for FY 2005 to FY 2009 ranged from 35 percent to 43 percent.



Representation In Immigration Courts			
FY 05	110 911	204. 043	314. 954
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SUPREME COURT
FILED
OCT 29 2010
OFFICE OF THE CLERK

No. 10-197

IN THE SUPREME COURT
OF THE UNITED STATES

CHRISTA FAREED BAUER, PETITIONER

V.

ERIC H. HOLDER, JR., ATTORNEY GENERAL,
RESPONDENT

ON PETITION FOR REHEARING OF DENIAL ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PETITION FOR REHEARING

Per Rule 44
#A097-597-220

Allan H. Bell
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Counsel for the Petitioner
October 29, 2010

No.: 10-197
IN THE SUPREME COURT
OF THE UNITED STATES

CHRISTA FAREED BAUER,
Petitioner,

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL
OF THE UNITED STATES OF AMERICA,
Respondent.

On Petition for Rehearing of Denial On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

PETITION FOR REHEARING

#A097-597-220

PETITIONER ATTORNEY'S CERTIFICATE OF COMPLIANCE WITH SUPREME COURT RULE 44.1

I, Allan H. Bell, counsel for Petitioner, Christa Fareed Bauer, and a member of the Bar of this Court, hereby certifies as follows:

1. That Petitioner's Petition for Writ of Certiorari was denied by the Honorable Court on October 4, 2010.

2. That after reviewing said denial, together with new developments in case law, Petitioner respectfully submits that there exists a good faith basis for petitioning the Honorable Court to rehear her Petition based on these new developments.

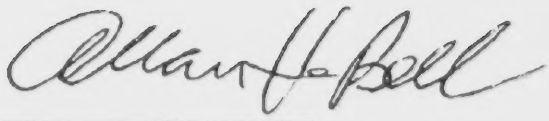
3. That in addition to said good faith basis for same, consistent with Supreme Court Rule 44.1, undersigned duly admitted counsel states that this Petition is not submitted for delay.

4. The grounds for this Petition are limited to intervening circumstances of a substantial or controlling effect or to other substantial grounds not previously presented.

5. Undersigned counsel certifies that this Petition for Rehearing complies with Supreme Court Rule 33 (Document Preparation-Formats), and Rule 34 (Document Preparation - General Requirements)

WHEREFORE, undersigned counsel respectfully requests the Honorable Court for its Order permitting the filing of Petitioner's accompanying Petition for Rehearing of Denial on Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit, and for such other relief as the court may deem just and proper.

Dated: October 29, 2010



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QUESTION PRESENTED

Whether the court, due to findings in the six week old Second Circuit holding in *Luna v. Holder*, Jr, 2010 WL 344786 (2nd Cir. 2010), should determine that Due Process includes a Sixth Amendment right to effective counsel, as applied to legal representation provided by non-attorney, government-accredited representatives, with a consideration of such in *Padilla*?

PARTIES TO THE PROCEEDINGS

The parties to the proceeding in the Court of Appeals for the Seventh Circuit were Petitioner, Christa Farced Bauer, and Respondent, Attorney General of the United States.

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QUESTION PRESENTED

Whether the court, due to findings in the six week old Second Circuit holding in *Luna v. Holder, Jr*, 2010 WL 344786 (2nd Cir. 2010), should determine that Due Process includes a Sixth Amendment right to effective counsel, as applied to legal representation provided by non-attorney, government-accredited representatives, with a consideration of such in *Padilla*?

INTRODUCTION/OVERVIEW

When fully considering Petitioner's Petition for Rehearing, et al herein, this Honorable Court is particularly asked to consider the urgent, unmet need for providing Due Process via guidance to wholly U.S. government-authorized immigration legal services, particularly by non-attorneys, to lawfully admitted aliens (such as Petitioner) who often lack knowledge of such a bedrock, constitutional entitlement.

Attached hereto as Pet. App. A, is an excerpt from a *Fordham Law Review* article, published November, 2009, that fully plumbs the depth of constitutionally deficient, immigration legal representation problems facing such lawfully admitted aliens, especially when provided by non-attorneys.

As in the well known, recent case of *Padilla v. Kentucky*, 130 S.Ct. 1473 (March 31, 2010), said aliens, including Petitioner, are often stuck at the bottom of the well of ineffective assistance of counsel

(IAC) as a result of acts - or nonacts - by a government-authorized Accredited Representative (A.R.), in lieu of licensed attorneys. These actions have clearly and often caused the alien to be improperly removed/deported, "... a dreadful punishment..." per Judge Hand in *Klonis v. Davis*, 13 F.2d 630 (2nd Cir. 1926). The *Fordham* article, authored by Prof. Careen Shannon, an Adjunct Professor of Immigration Law at Benjamin Cardozo School of Law, combined with the recent *Padilla* and *Luna* cases described below, offer a ray of hope of finally lighting the Due Process route. Prof. Shannon leads off at p. 577 (Pet. App. A), by stating that:

> "Immigrants are often easy prey for bogus or incompetent attorneys, "notarios", scam artists, and other bad actors who take advantage of immigrants' limited knowledge of U.S. law, lack of English fluency, and lack of cultural knowledge to charge exorbitant fees for wild promises of green card and citizenship, that the bad actors cannot - or in some cases never intended to - deliver. Such exploitation is merely a symptom, however, of the larger problem of inadequate access to competent legal counsel by a foreign national seeking to navigate our labyrinthine scheme of immigration laws, regulations, and policies. Contrary to popular belief, not all of these foreign nationals are "illegal aliens" who slipped over our southern border; many are entitled to obtain lawful immigration status [such as Petitioner], if only they had adequate guidance from qualified counsel to help them seek it.

To aid in this consideration, this Court is urged to fully consider the ramifications of the following:

A. This Court's holding in *Padilla v. Kentucky*, 130 S. Ct. 1473 (March 31, 2010) at p.1 of the opinion, per Justice Stevens, holding that the alien's "claim was subject to the *Strickland* 466 U.S. 668, 688, 694 (1984) ineffective assistance [of counsel] test, not only to extent that [s]he alleged affirmative misadvice, but also to extent that [s]he alleged omission by counsel...;" citations of abrogated cases omitted.

B. The holding of the Second Circuit Court of Appeals on September 3, 2010, per Judges Pooler, Calabresi, and Chin, in *Luna v. Holder*, Jr, *Id.*, that, at p.7 thereof, states "...an ineffective assistance of counsel claim is a constitutional claim that arises under the Due Process Clause of the Fifth Amendment citing *Omar v. Mukasey* , 517 F.3d 647, 650 (2nd Cir. 2008). Omar concerned ineffective assistance of counsel by a non-attorney (A.R.) in an immigration context. As defined/detailed below, Judge Pooler went on to recite, also at p. 7, a claim in *Luna* "that the government prevented a petitioner from filing a timely petition for review..." NOTE: The Court can take judicial notice that the EOIR - Executive Office of Immigration Review is part of the U.S. Department of Justice, an agency of the American government.

C. Thus, Petitioner clearly meets Prof. Shannon's above description of "easy prey."

That is because, as detailed in the Statement of The Case below, the lawfully admitted Petitioner who has now been married to her USC active duty Navy husband for about five years, has been denied adjustment to that of permanent resident because she missed her asylum court hearing. That was because, similar to Prof. Shannon's article, Petitioner obviously received IAC when her non-attorney fully accredited (by the U.S. Government's) Executive Office of Immigration Review a/k/a EOIR told Petitioner to skip the hearing because the A.R. would cancel it due to the purported superior filing for permanent residence the A.R. had made on behalf of Petitioner's sailor husband and Petitioner, again via the A.R., for $400.

The problem as highlighted by Justice Stevens, Judge Pooler in *Luna,* Judge Katzmann in *Omar, Id.* and emphasized by Prof. Shannon, was and is that there is apparently little to be done about the A.R.'s bad advice. (The A.R. is not an attorney, so no bar complaint is possible. Petitioner's approximate 11 month old complaint to the EOIR had, after about six months, elicited no response, though recently she received a general reply that the complaint is being investigated).

Serious, life/liberty-impacting trial errors by an A.R. have arisen. Parallel to Judge Pooler's comments in *Luna, Id.* that (per *Omar, Id,* a claim of government action posing a barrier to the alien's Due Process rights), apparently grew from a handful of

such instances, in 2005, when Petitioner's travail began) exponentially to June 1, 2010, all "under the radar".

And thus Petitioner's Petition for Rehearing, herein.

Petitioner's original Petition for Writ of Certiorari, was denied October 4, 2010. Since that June 15, 2010 filing, however, the landscape of Respondent's predicament dramatically changed with Judge Pooler's Decision of September 10, 2010, and the ability to consider same together with Prof. Shannon's timely law review article.

This introduction is designed to spotlight badly needed Supreme Court intervention to inject Due Process, by finding that ineffective assistance of counsel, as in the instant case, by an A.R., can constitute exceptional circumstances to permit the reopening of a case, on an equitable tolling basis, when equities support the Motion.

OPINIONS/COURT ORDERS BELOW

In Petitioner's case: the *in absentia* Order of Removal by the Immigration Judge of November 28, 2005 (Pet. App. B), Order of the BIA dated July 31, 2008 dismissing Appeal (Pet. App. C), Seventh Circuit Decision dated November 23, 2009, denying appeal (Pet. App. D), Order of the U.S. Court of Appeals dated January 12, 2010 denying Petition for Rehearing (Pet. App. E). Order of the U.S. Supreme Court of October 4, 2010, denying the Petition for Writ of Certiorari to the Seventh Circuit Court of

Appeals (Pet. App. F).

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). Also, S.Ct. Rule 44 pertaining to this Petition for Rehearing, et al.

STATUTORY BACKGROUND

The Immigration and Nationality Act (INA) allows a court of appeals considering a final order of removal pursuant to 8 U.S.C. §1252 to review "all questions of law and fact, including interpretation and application of constitutional and statutory provisions, arising from any action taken or proceeding brought to remove an alien." *Id.* §1252(b)(9). IN IIRIRA however, Congress amended the INA to preclude judicial review of any "decision or action of the Attorney General..., the authority for which is specified under this subchapter to be in the discretion of the Attorney General..., other than the granting of asylum. *Id* § 1252(a)(2)(B)(ii). The phrase "this subchapter" refers to subchapter II of Chapter 12 of Title 8 of the United States Code, which includes §§1151-1381.

In the "subchapter " reference to-specifically, 8 U.S.C. §1229 (a)(1) - Congress, among other things vested the IJ s with the general authority to "conduct proceedings for deciding the inadmissibility or deportability of an alien."

STATEMENT OF THE CASE

[Restated from Petition for Writ, et al, with relevant attached appendix exhibits omitted in this Petition For Rehearing, et al]

Petitioner arrived from Zambia in the Greenbelt, Maryland, USA area on July 24, 2000, on a B-2 visitor visa [lawfully admitted, exactly the same as in the seminal case - that cries out for reversal - of *Fong Yue Ting v. United States,* 149 U.S. 698, 730 (1893). There she met with a non-attorney, immigration free-lancer, Mr. Emanuel Chembe, who took her money, forged her signature to the first Asylum Application in this case on August 27, 2003 and later filed the relevant Asylum Application on November 5, 2003, and twice filed same with the (now) USCIS without her knowledge (prior mooted case #09-1280). She concedes receiving notice of an Immigration Court hearing in Kansas City, due to the second fraudulent filing, from where this case originated. Soon after, on approximately November 12, 2004, she received an ICE Notice to Appear for an immigration hearing in Kansas City on said forged asylum application.

Well, prior to the above November 28, 2005 *in absentia* hearing, she married USC Qasim Fareed, a highly decorated Naval Officer, on December 31, 2004. She next visited a local charity office, an EOIR (thus government) - accredited agency, that has a well deserved history of providing low cost, routine immigration legal assistance to aliens such as Petitioner, in March, 2005. The agency via its A.R. provided assistance in preparing and eventual filing

of a routine I-130/I-485 joint petition by the two of them to adjust her status with her husband.

During her several appointments with the Petitioner's voluntary agency and with the assistance of an EOIR-Accredited Representative (A.R.) of the agency, later identified by her initials as M.O., she and her husband prepaid all USCIS filing fees, an A.R. service fee of $400, and discussed with the A.R. the Petitioner's pending removal hearing at the Immigration Court scheduled for July 5, 2005. The A.R. (formerly known as a Volag, parlance for volunteer agency) told Petitioner that she would prepare and file the I-130/I-485 papers requested and paid for, and for Petitioner, *pro se*, to request a continuance from the IJ of her first hearing date of July 5, 2005. She did, and her case was postponed to November 28, 2005.

The A.R. filed Petitioner's I-130/I-485 joint petition on November 17, 2005. The A.R. also told Petitioner she didn't have to appear at the November 28, 2005 hearing, because she was properly married to a USC, the A.R. had filed papers to adjust her status to permanent residence well before the hearing, and the IJ would be alerted to this filing so as to routinely continue her hearing. Petitioner was informed of all information in the preceding sentence by this A.R., who was permitted to practice immigration law by federal regulations, in USCIS/EOIR proceedings, *supra*; and that said A.R. would also request such a continuance of the November 28, 2005 hearing which she said she had done by means of a letter she sent, as an A. R. of Petitioner, to the U.S. Asylum Office in Chicago on

November 9, 2005.

Entirely relying on the A.R.'s advice, who she trusted 100% more than the earlier described Maryland confidence man, Petitioner did not attend the November 28, 2005 hearing. The IJ, seeing that Petitioner was not in attendance, issued a removal order to -egads!- Zimbabwe, determining, among other things, that this was also an *in absentia* hearing, though Petitioner had received notice of the hearing.

Petitioner was oblivious and unsuspecting of the IJ's order of removal of November 28, 2005, because, per the A.R.'s above-referenced assurances of early-November, 2005, she received a receipt notice dated November 17, 2005, that her adjustment petition had been received from the USCIS, and to report to the USCIS in Kansas City on January 10, 2006, for a routine fingerprinting . She received a USCIS notice form I-797C, approximately March 2, 2006, for Petitioner and her USC husband to appear at the USCIS office in Kansas City on April 24, 2006. This was for a routine interview, generally the final step in Petitioner obtaining adjustment of status to that of a permanent resident. This notice, on the face of it, was mailed to Petitioner c/o A.R. M.O., at the "JVS" (A.R.'s) place of business. Petitioner and her husband were thrilled with anticipation.

Unfortunately, soon after March 14, 2006, the USCIS sent a letter to the same A.R. M.O., stating that Petitioner's case was closed - - - because she was "the subject of a final removal order.." due to her involvement "in [the above] removal proceedings".

Further, Petitioner was informed via the A.R., dated April 10, 2006, that her I-485 interview - marked "filed November 17, 2005," 11 days before the so-called missed Immigration Court hearing - had been "canceled due to unforseen circumstances." The A.R. belatedly, after many, unreturned Petitioner complaint calls to her, in July 2006, learned that she had been ordered deported.

Petitioner, and via her USC husband, attempted to protest the March 14, 2006 action to the A.R. via many calls. In other words, and contrary to the IJ's remarks on this point in the denial of Petitioner's Motion to Reopen, Petitioner and her husband simply never heard back from their timely complaints to the A.R. and her agency. Petitioner was well aware of the A.R.'s volunteer, charitable, low cost activities, and did not wish to cause trouble for the M.O. - nor other needy aliens. The Petitioner learned in mid July, 2006 that A.R.'s letter to the USCIS of November 9, 2005, withdrawing Petitioner's USCIS asylum application , (the basis for the November 28, 2005 IJ hearing), was clearly meant to cancel that hearing because, as the letter stated, "Christa hired me to represent her in her application to change and adjust her status through the marriage with her USC husband ...". Of strong importance, was that this letter, sent to the USCIS, was signed by the A.R. M.O. as "BIA Accredited". The A.R. offered no help. As stated in Petitioner's affidavit, the A.R. though given an opportunity to respond to Petitioner's complaints of IAC, did not do so.

Petitioner, via undersigned attorney, filed her

Motion to Reopen with the IJ on September 26, 2006, 176 days after she first learned, via the above USCIS case closure letter, of the said IJ's *in absentia* removal order. This was well within the statutory 180 days deadline to file a motion to reopen, which is unlimited for an *in absentia* hearing. There is unlimited time, statutorily, to file a motion to reopen where an *in absentia* hearing, as here, according to the IJ, particularly where exceptional circumstances, such as IAC are shown, per 8 C.F.R. sec. 1003.2(g). Also see *Singh v. Gonzalez*, 436 F.3d 484 (5th Cir. 2006).

Thus, Petitioner is now seeking reversal or remand to the lower courts on a denial of Due Process per *Reno v. Flores*, 507 U.S. 292, 306 (1993), and due to ineffective assistance counsel (IAC), based on exceptional circumstances, per *Padilla, Id.*

ARGUMENT/REASONS FOR GRANTING THE WRIT

Where a government-actor A.R. provided IAC to a lawfully admitted alien, the Fifth and Sixth Amendment implications should be adhered to, according to Judge Pooler in the opening paragraph, p. 2 of his Second Circuit decision in *Luna, Id.*:

> Petitioners Worklis *Luna* and Tasmann Anthony Thompson [same as Respondent] have filed petitions for review of final orders of removal issued by the Board of Immigration Appeals ("BIA"). The government has moved to dismiss the petitions as untimely. Petitioners *Luna* and Thompson [i.e.

> Respondent] concede that their petitions are untimely, but allege that "circumstances beyond their control-[ineffective assistance of counsel and circumstances created by the government, respectively]-prevented them from filing timely petitions for review..at p. 10.

Then according to Justice Stevens in *Padilla, Id.* at p. 4 thereof:

> To satisfy *Strickland's* two-prong inquiry, counsel's representation [Sixth Amendment] must fall "below an objective standard of reasonableness," 466 U.S., at 688, 104 S. Ct. 2052, and there must be "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different," *id.*, at 694, 104 S. Ct. 2052 .... And this Court has recognized the importance to the client of "'[p]reserving the...right to remain in the United States [Fifth Amendment]'" and "preserving the possibility of' discretionary relief from deportation. *INS v. St. Cyr*, 533 U.S. 289, 323, 121 S.Ct. 2271, 150 L.Ed.2d 347.

Then, in *Omar, Id.*, according to Judges Katzmann, Kearse and Calabresi at p. 651, the BIA is still propounding standards on how to handle complaints to the Government's EOIR to handle client complaints of IAC.

Finally, Prof. Shannon, at p. 621, fn. 208, Pet. App.A a3, found herself reaching way back. As

Justice Stevens did in *Padilla, Id.*, she quoted Justice Fields from his dissent in the epic case of *Fong Yue Ting v. U.S.*, 149 U.S. 69, 759 (1893), where he stated: "As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence and the breaking up of all the relations of friendship, family and business..."

To end the nightmares described in *Luna,* Padilla, *and* Omar, *Id.*, caused by an A.R., this Court is urged to hold that such IAC violates the Fifth and Sixth Amendments, and is an exceptional circumstance to justify tolling the 180 day motion to reopen deadline, and remand this case to the BIA or trial court for further proceedings, as appropriate.

SUMMARY

The words of Prof. Shannon, at p. 622, Pet. App. A, a4, of her article, totally echo undersigned counsel's thoughts that he hopes this Honorable Court will ponder when considering Christa Fareed Bauer's plight: "[we should be]...restoring a sense of integrity to an aspect of our [immigration] law that does not currently reflect the ideals of justice on which our nation was founded."

CONCLUSION

For the significant policy reasons stated above, Petitioner respectfully urges the Honorable Court to grant the Petition for Rehearing of Denial on Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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Allan@bellhawoffice.com
Counsel for the Petitioner

October 29, 2010

APPENDIX A

REGULATING IMMIGRATION LEGAL SERVICE PROVIDERS: INADEQUATE REPRESENTATION AND NOTARIO FRAUD

Careen Shannon*

on behalf of
The Subcommittee on Addressing Inadequate Representation

Immigrants are often easy prey for bogus or incompetent attorneys,"notarios," scam artists, and other bad actors who take advantage of immigrants' limited knowledge of U.S. law, lack of English fluency, and lack of cultural knowledge to charge exorbitant fees for wild promises of green cards and citizenship that the bad actors cannot—or in some cases never intended to—deliver. Such exploitation is merely a symptom, however, of the larger problem of inadequate access to competent legal counsel by foreign nationals seeking to navigate our labyrinthine scheme of immigration laws, regulations, and policies. Contrary to popular belief, not all of these foreign nationals are "illegal aliens" who slipped over our southern border; many are entitled to obtain lawful immigration status, if only they had adequate guidance from qualified counsel to help them seek it. Unfortunately, there is no constitutionally guaranteed right to counsel in immigration proceedings (even in cases where deportation is at stake), and competent private and nonprofit resources are limited. After illustrating the

nature of the problem with some real-life stories of immigrants who have been victimized by fraudulent service providers, and discussing the current state of the law with respect to what constitutes the inadequate practice of immigration law and who is legally permitted to represent immigrants in immigration matters, this report proposes changes to local, state, and federal law and policy that would help to combat fraudulent activities by unscrupulous nonlawyers and inadequately trained lawyers alike. These and other proposals are put forth in an attempt to help lay the groundwork for ensuring that immigrants in need of competent legal counsel can access the help to which they should be entitled....

....Given the judicial consensus that the Sixth Amendment does not apply [where a government actor, as in Bauer, supplies IAC current case law as description this Petition such as Omar, Id., concludes that the Sixth Amendment applies to the alien's right to counsel] because removal proceedings are civil rather than criminal matters (ignoring the fact that banishment and exile can, in many cases, constitute a much more severe punishment than imprisonment),208 efforts should be made to create a statutory right to counsel instead....

208 See Fong Yue Ting v. United States, 149 U.S. 698, 759 (1893) (Field, J., dissenting)("As to its cruelty, nothing can exceed a forcible deportation from a country of one's residence, and the breaking up of all the relations of friendship, family, and business . . . .").

CONCLUSION

As made clear by recent news events—such as the arrest of Victor Espinal in New York and the hundreds of immigrants who showed up at the New York City Bar's free legal clinic on just one occasion, desperate for help in regularizing their immigration status,211 and the civil judgment that attorneys from the Bryan Cave law firm won against a notario in Maryland212—the exploitation of immigrants by unsavory service providers, lawyers and nonlawyers alike, continues apace .... While a problem of this magnitude is not easily solved, there are a number of concrete changes that could be made to law and policy—as we have outlined above—that would make an enormous difference in the lives of the affected immigrants and their family members (the latter of whom may actually be lawful permanent residents or U.S. citizens in many cases). However, such changes would also redound to the benefit of our legal system as a whole, restoring a sense of integrity to an aspect of our law that does not currently reflect the ideals of justice on which this nation was founded.

APPENDIX B

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
HEARING LOCATION: KANSAS CITY, MO

In the Matter of Christa Bauer
Respondent: IN REMOVAL PROCEEDINGS

File: A97-597-220

ORDER OF THE IMMIGRATION JUDGE

This is a summary of oral decision entered on 11-28-05. This memorandum is solely for the convenience of the parties. If the proceedings should be appealed or reopened, the oral decision will become the official opinion in the case.

[x] The respondent was ordered removed from the United States to Zimbabwe.

[ ] Respondent's application for voluntary departure was denied and respondent was ordered removed to _____ alternative to _____.

[ ] Respondent's application for voluntary departure was granted until _____ upon posting a bond in the amount of _____ with an alternative order of removal to.

[x] Respondent's application for asylum was ( ) granted, lack of presentation. ( ) withdrawn.

[ ] Respondent's application for withholding of removal was ( ) granted (X) denied ( ) withdrawn.

[ ] Respondent's application for withholding/ defferal of removal under Article 3 of Torture

Convention was ( ) granted ( ) dented ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under Section 240A(a) was ( ) granted ( ) denied ( ) withdrawn.

[ ] Respondent's application for cancellation of removal under Section 240A(b) was ( ) granted ( ) denied ( ) withdrawn. If granted it was ordered that the respondent be issued all appropriate documents necessary to give affect to this order.

[ ] Respondent's application for a waiver under Section _____ of the INA was ( ) gratned ( ) denied ( ) withdrawn ( ) other.

[ ] Respondent's application of adjustment of status under Section 212c of the INA was ( ) gratned ( ) denied ( ) withdrawn. If granted, it was ordered that respondent be issued all appropriate documents necessary to give effect to this order.

[ ] Respondent's status was rescinded under Section 246.

[ ] Respondent is admitted to the United States as until ____.

[ ] As a condition of admission, respondent is to post a $_____ bond.

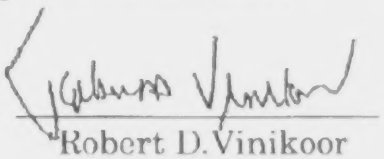
[ ] Respondent knowingly filed a frivolous asylum application after proper notice.

[ ] Respondent was advised of the limitation on discretionary relief for failure to appear as ordered in the immigration judge's oral decision.

[ ] Proceedings were terminated, without prejudice.

[ ] Proceedings were administratively closed.
[x] Other:_____

Date: 11-29-05
Administrative Control Court: Immigration Court, 55 East Monroe, Suite 1900, Chicago, IL 60603. Hearing conducted by: Telephone Conference/ Video Conference
Appeal:
APPEAL DUE BY:



Robert D. Vinikoor
Immigration Judge

APPENDIX C

U.S. Department of Justice
Executive Office for Immigration Review
Immigration Court Chicago

In the Matter of: Case No.: A97 597 220

Christa Bauer

Docket: _____

Respondent/Applicant IN Removal Proceedings

ORDER OF THE IMMIGRATION JUDGE

Upon consideration of respondent's/applicant's

_____ Motion to Reconsider an Immigration Judge's decision

__X__ Motion to Reopen proceedings

filed in the above entitled matter, it is HEREBY ORDERED that the motion _____ be granted.

__X__ be denied for the reasons indicated below:[1]

Robert D. Vinikooor
Immigration Judge
Date: November 6, 2006

[1]The respondent's motion to reopen is timely and fails to establish the requirements for re-opening under Section 240(b)(5)(C) of the INA. Therefore, the motion is denied. The record reflects that the respondent received both the Notice to Appear and her hearing notice for November 28, 2005. The respondent's affidavit indicates that she did not intentionally appear because she had married a United States citizen. Although the respondent claims that she may have been misinformed by a volunteer agency who helped her prepare an I130/I485 application, she has submitted nothing from this agency to show that she was misinformed or ever advised them that she was under removal proceedings. To the contrary, the agency apparently denies that they knew that she was under proceedings. The respondent's mistake falls far short of meeting the "exceptional circumstances" requirement of the statute. Moreover, the respondent did not file her motion to reopen within 180 days of the removal order in her case. Therefore, her motion is also untimely. See Section 240(b)(5)(C)(i).

Accordingly, for all of the foregoing reasons the respondent's motion to reopen will be denied.

APPENDIX D

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

ALLAN H. BELL, ESQUIRE	Office of the District Counsel/KAN
2022 Swift St., Ste. 202	9747 North Conant Ave.
N. Kansas City, MO 64116-3442	Kansas City, MO 64153

Name: BAUER, CHRISTA A097-597-220

Date of this notice: 7/31/2008

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

Donna Carr
Donna Carr
Cheif Clerk

Enclosure

Panel Members:
Snow, Thomas G.

U.S. Department of Justice
Appeals Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration

Files: A097 597 220 - Kansas City, MQ Date: Jul. 31, 2008

In re: CHRISTA BAUER.

IN REMOVAL PROCEEDINGS

APPEAL & MOTION·

ON BEHALF OF RESPONDENT: Allan H. Bell, Esquire

APPLICATION: Reopening

The record reflects that removal proceedings were instituted against the respondent under two different alien registration numbers. On September 28, 2004, the Department of Homeland Security (DHS) served the respondent by regular mail with a Notice to Appear under A097 126030. On November 2, 2004, the DHS served the respondent by regular mail with a Notice to Appear under A097 597 220. In this decision, we will consider the record of proceedings pertaining to A097 597 220. The appeal will be dismissed and the motion to consolidate will be denied.

On November 28, 2005, the Immigration Judge ordered the respondent removed in absentia for her failure to appear. On September 26, 2006, the respondent filed a motion to reopen acknowledging receipt of the Notice to Appear and the hearing notice rescheduling her hearing for November 28, 2005. The respondent asserted that her motion to reopen was timely because it was filed within 180 days from the date that she first learned that an in absentia order for removal was issued against her. However the respondent failed to file her motion to reopen within

180 days after issuance of the final order, as is required under section 240(b)(5)(C) of the Act. Furthermore, the respondent has not filed a joint motion to reopen. Pursuant to 8 C.F.R. §1003.23(b)(4)(iv), the time and numerical limitations shall not apply to a motion reopen agreed upon by all parties and jointly filed.

In her motion to reopen, the respondent contended that she believed the combination of her marriage and the fillings of a visa petition and adjustment of status application would cancel out any need to appear before the Immigration Judge, according to information she had received from various acquaintances at the time, nothing that she did not have an attorney to advise her on this issue. The respondent also claims that Ms. Omazic at the Jewish Vocational Services (JVS) prepared and filed the visa petition and adjustment of status application on November 17, 2005, and that she informed Ms. Omazic that she was scheduled to appear at a hearing on November 28, 2005. However, she indicates that Ms. Omazic does not recall the respondent mentioning her scheduled hearing, and she claims that there must be a misunderstanding with Ms. Omazic on this point. The DHS opposed the respondent's motion to reopen, arguing that it was not timely filed, and that she failed to demonstrate exceptional circumstances for her failure to appear. The Immigration Judge denied the motion to reopen, finding that it was filed untimely, and that she failed to establish the requirements for reopening under section 240(b)(5)(C) of the Act. The Immigration Judge noted that he respondent did not submit any1hing from the JVS to show that she was misinformed or ever advised them that she, was under removal proceedings.

On appeal and in her reply to the government's memorandum, the respondent raises several new issues. She now contends that she has established exceptional circumstances due to ineffective assistance of counsel, based on her claim that Ms. Omazic (a legal assistant at the JVS) informed her hat it was riot necessary to attend, her hearing on November 28, 2005, as it had been canceled out due to her pending visa petition and adjustment of status application. She also asserts that the filing deadline should be equitably tolled from at least April 2, 2006, when she first became aware of the removal order.

We have held that ineffective assistance of counsel can constitute an "exceptional circumstance" or purposes of rescission of an in absentia order where the alien establishes that the failure to appear was the result ineffective of counsel and where the criteria set forth in *Matter of Lozala*, 19 I&N Dec. 637 (BIA 1988), *aff'd*, 857 F.2d 10 (1st Cir. 1988), are satisfied, *Matter of Assaad*, 23 I&N Dec. 553 (BIA 2003). *Matter of Lozada* requires (1) that the motion be supported by an affidavit of the allegedly aggrieved respondents setting forth in detail the agreement that was entered into with counsel with respect to the actions to be taken and what representations counsel bid or did not make to the respondent; (2) that counsel whose integrity or competence is being impugned be informed of the allegations leveled against him or her and be given an opportunity to respond; and (3) that the motion reflect whether a complaint has been filed with appropriate disciplinary authorities with respect to any violation of counsel's ethical or legal responsibilities, and if not, why not. *Id. At 639.*

The United States Court of Appeals for the

Eighth Circuit within whose jurisdiction this case arises; upheld the Board's finding that an alien failed to establish exceptional circumstances wherein she alien inconsistently claimed that she misunderstood her attorney to say that she did not need to appear, and that he outright told her not to appear. See *Gitau v. Mukasey*, 520 F.3d 906 (8th Cir. 2008) (Board did not abuse its discretion in finding that alien failed to establish exceptional circumstances, due to her inconsistent claims regarding her former attorney and the basis for her failure to appear). Similarly, in this case the respondent has presented very different allegations in her motion to reopen and on appeal regarding the basis for her failure to appear. The respondent stated in the affidavit submitted with her motion to reopen that she believed the combination of her marriage and the filings of a visa petition and adjustment of status application would cancel out any need to appear before the Immigration Judge; according to information she had received from various acquaintances at the time. The respondent also claimed that she informed Ms. Omazic that she was scheduled to appear at a hearing on November 28, 2005, but that Ms. Omazic does not recall the respondent mentioning her scheduled hearing. However, on appeal the respondent now asserts that Ms. Omazic informed her that it was not necessary to attend her hearing on November 28, 2005, as it had been canceled out due to her pending visa petition and adjustment of status application. Moreover, the respondent has failed to comply with the requirements set forth in *Lozada*. The affidavit submitted with the motion to reopen does not set forth the representations that the respondent now claims the legal assistant

made to her.[1] The respondent has not submitted any evidence that Ms. Ozamic has been informed of the allegations leveled against her and that she has been given an opportunity to respond. The respondent also has not indicated that a complaint has l been filed with any disciplinary authorities regarding Ms. Ozamic or the Jewish Vocational Services. *See Habchy v. Gonzales*, 471 F.3rd 858 (8th Cir. 2006) (alien's failure to file a *Lozada*-compliant motion to reopen within the statutory deadline bars his claim for relief on the basis of "exceptional circumstances"). Consequently, the respondent has failed to establish a valid ineffective assistance of counsel claim and has failed to establish exceptional circumstances for her failure to appear. Therefore, we need not reach the issue of whether equitable tolling should be applied in this case.

The respondent also appears to contend that her hearing should have been routinely continued under *Matter of Velarde*, 23 I&N Dec. 253 (BIA 2002), since the DHS knew, or should have known, of the visa petition and application for adjustment of status that had been filed based on the respondent's marriage to a United States citizen. The respondent does not contend that she ever sought a continuance of her hearing scheduled for November 28, 2005. The regulations provide that an Immigration Judge has the discretion to grant a request for continuance where good cause is shown. *See* 8 C.F.R. §1003.29. However, even if an alien does file a motion to continue, the parties are obligated to appear for a scheduled hearing unless and until the Immigration Judge expressly grants a request for a continuance. *See Matter of W-F-*, 21 I&N Dec. 503 (BIA 1996) (the filing of a motion for

---

[1] The "Complete Affidavit of Christa Farwell Bauer" filed on April 9, 2007, also does not address the respondent's ineffective assistance of counsel claim

a continuance does not excuse an alien from failing to appear. The respondent never sought a continuance and was never granted such a request, nor was it the government's duty to seek a continuance on her behalf. The respondent acknowledged receipt of the Notice to Appear and the notice of hearing, both of which informed the respondent of the consequences of a failure appear. The Immigration Judge was within his bounds to conduct the proceedings in absentia.

The respondent avers that her marriage to her husband, who is an active duty and decorated member of the U.S. constitutes special circumstances entitling her to have her case reopened to consider her application for adjustment of status. The respondent has not cited any pertinent legal authority in support of her argument that the Board may reopen proceedings based on "special circumstances". However, even if we construe the respondent's contention as a request that the Board exercise its *sua sporue* authority to reopen her removal proceedings, we find that the facts presented in this case do not warrant an intervention of our *sua sponte* authority to reopen the proceedings. *See* 8 C.F.R. §1003.2(a); *see also Matter of G-D*, 22 I&N Dec. 1132 (BIA 1999); Mater of J_J, 21 I&N Dec. 976 (BIA 1997).

On April 9, 2007, the respondent filed a motion to consolidated the records in A097 126 030 and A097 597 220. As the proceeding under A097 126 030 are not currently on appeal before the Board, and the two proceeding concern separate issues of notice and exceptional circumstances, the motion to consolidated

will be denied[2]. Accordingly, the flowing orders will be entered.

ORDER: The appeal is dismissed.

FURTHER ORDER: The motion to consolidate is denied.

FOR THE BROAD

[2] In the removal proceedings under A097 126 030, the respondent filed a motion to reopen on March 23, 2007. The DHS filed a response to the motion to reopen, stating that it did not oppose reopening and termination of the removal proceeding for lack of proper service, pursuant to *Ghounem v. Ashcroft*, 378F.3d 740 (8th Cir. 2004). The DHS did not concede that the respondent has established her true identity or that the proceeding should be reopened under A097 597 220 based on exceptional circumstances. The record reflects that the Immigration Judge did not have an opportunity to consider the respondent's motion to reopen under A097 126 030. Consequently, the record must be returned to the Immigration Judge for consideration of the respondent's motion to reopen.

APPENDIX E

NONPRECEDENTIAL DISPOSITION
To be cited only in accordance with
Fed. R. App. P. 32.1

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued November 17, 2009
Decided November 23, 2009

Before
FRANK H. EASTERBROOK, *Chief Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*

Nos. 08-3243 & 09-1280

CHRISTA FAREEDBAUER
Petitioner
v.
ERIC H. HOLDER, JR.,
Attorney General of
the United States,
Respondent

Petitions for Review of an Orders of the Boards of Immigration Appeals.

Order

Christa Bauer, a citizen of either Zambia or Zimbabwe, applied for asylum in the United States. (Her passport is from Zambia, and several affidavits presented in sup-

port the application for asylum acknowledge birth in that nation; but in the asylum application itself Bauer asserts that she was born in Harare, Zimbabwe, and is a citizen of that nation.) An immigration judge scheduled a hearing for November 28, 2005. Bauer did not appear. Eleven days before the hearing, she had filed a notice withdrawing the claim for asylum: she had decided instead to pursue a petition for adjustment of status on the basis of marriage. Because Bauer did not appeal:, she was ordered removed in absentia. The IJ also denied her request for asylum; apparently he had not received the notice withdrawing that request. But that decision did not matter, because the removal order rests on the facts that Bauer is neither a citizen of the United States nor the holder of a visa entitling her to be here. And once the order of removal was entered, the agency closed its me on Bauer's request for adjustment of status.

Bauer had 180 days to file a motion to reopen the proceedings, a step that could have allowed the agency to act on the petition for adjustment of status. 8 U.S.C. §1229a(b)(5)(C). She took more time than that Bauer contends that she did not learn about the removal order until April 3, 2006. Through legal counsel, she filed a motion to reopen on September 26, or 176 days after she concedes receiving actual notice. (Bauer has given at least four other dates as the receipt of notice; April 3 is the latest, so we use that without considering the consequences of this curious inconsistency.) The statutory 180-deadline runs from "the date of the order of removal", not from the date the order is received. As of April 3, 2006, Bauer had 54 days left to file a timely motion. She has never explained why she did not file within that period. Instead her lawyer has

espoused the view that the time runs from receipt of notice, rather than from the date of the removal order, and that there is therefore no delay in need of explanation. Counsel has never offered any authority for that position, however.

The IJ denied the motion to reopen, for two reasons: first, it was untimely; second Bauer has not established "exceptional circumstances" (the standard for relief on a timely motion). Bauer filed an affidavit concerning her decision to skip the hearing. In it she asserted that "I thought the combination of my marriage and the [adjustment-of-status] filing would cancel out any need to appear before the judge". Bauer did not suggest that the IJ or any of the agency's employees had advised her that she could simply ignore an order to appear for a hearing. The IJ understandably concluded that an alien's decision to ignore an IJ's order to appear is not the sort of circumstance that justifies starting over.

On appeal to the Board of Immigration Appeals, Bauer filed a second affidavit. This time she attributed her decision to advice from Marianna Omazic, an immigration counselor (a non-lawyer assistant accredited by the agency, see 8 C.F.R §12~22(d)). Bauer did not supply any written advice to that effect from Omazic, nor did the affidavit (or any other document filed with the BIA) present Omazic's version of any conversations she may have had with Bauer. Neither the affidavit nor any other document stated that Bauer had lodged a complaint with the agency, which has the authority to remove Omazic from the rolls of accredited counselors. See 8 C.F.R. §1292.3. The BIA dismissed Bauer's appeal, ruling that the second affidavit was

no better than the first at establishing exceptional circumstances. The Board thought that, by parallel to Matter of Lozada, 19 I&N Dec. 637 (1988.), Bauer had to confront Omazic with the allegation that unprofessional advice had been rendered, obtain (and include in the record) a response to that accusation, and file a formal charge of misconduct with the regulatory body. None of these steps had been taken. Bauer then filed a motion to reconsider, which the BIA denied. We have consolidated Bauer's petitions for review of the motions to reopen and reconsider.

We held in *Kucana v. Mukasey*, 533 F.3d (2008), cert. granted, 129 S. Ct. 2075 (2009), that 8 U.S.C. §1252(a)(B)(ii) precludes jurisdiction over petitions to review or statutory or constitutional argument. Bauer contends that she has a constitutional argument that bad advice from a non-lawyer counselor means that the IJ's order violates order entered in November 200.5 The orders at issue are those entered by the BIA in 2008 (denying reopening) and 2009 (denying reconsideration of the 2008 decision). Bauer does not present any constitutional objections to *those* orders.

Whether the petition to reopen was timely, whether that time should be equitably tolled (as Bauer argued before the BIA), and whether "exceptional circumstances" support reopening are non-constitutional issues. Bauer does not contend that the Board made an error of law; instead she contends that the IJ and the BIA abused their discretion by not accepting her untimely motion and not deeming the circumstances "eceptional." Those are the very sort of discretionary decisions on which §1252(a)(2)(B)(ii) makes the administrative decision final. See, e.g. *Huang v. Mu-*

kasey, 534 F. 3d 618, 622 23 (7th Cir. 2008). See also, e.g., *Stroe v. INS,* 256 F. 3d 498 (7th Cir. 2001) (because there is no right to appointed counsel at public expense in removal proceedings, bad legal, advice is not a constitutional problem but, as in other civil litigation, is imputed to the client); *Magala v. Gonzales,* 434 F.3d 523 (7th Cir. 2005).

Kucana holds that decisions not to reopen are covered by §1252(a)(2)(B)(ii) (subject the proviso for statutory and constitutional arguments), because it reads the reference "discretion" in §1252(a)(2)(B)(ii) to include not only discretion specified in the immigration and Naturalization Act, but also discretion exercised *under* that Act. Regulations under the Act make reopening discretionary. The other possible understanding of §1252(a)(2)(B)(ii); advanced by the alien in *Kucana,* limits that statute to discretion conferred by the statutory text. If the Supreme Court should agree with that argument, ?? we would have jurisdiction. But Bauer still could not prevail, for §1229a(b)(5)(C) provides that an order of removal may be rescinded

> only—
>
> (i) upon a motion to reopen filed within 180 days after the date of the order of removal if the alien demonstrates that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section), or
>
> (ii) upon a motion to reopen filed at any time if the alien demonstrates that the alien did not receive notice in accordance with paragraph (1) or (2) of section 1229(a) of this title or the alien demonstrates that the alien was in Federal or State

> custody and the failure to appear was through no fault of the alien.

Bauer cannot use subsection (i), because her motion was filed more than 180 days after the order of removal. And subsection (ii) does not apply by its terms: Bauer does not contend that she did not receive notice of the hearing, or that she was in custody at the time of the hearing.

And even if all of this is mistaken, substantial evidence supports the Board's decision that Bauer has not demonstrated "that the failure to appear was because of exceptional circumstances (as defined in subsection (e)(1) of this section)". Subsection (e)(1) reads: "The term 'exceptional circumstances' refers to exceptional circumstances (such as battery or extreme cruelty to the alien or any child or parent of the alien, serious illness of the alien, or serious illness or death of the spouse, child, or parent of the alien, but not including less compelling circumstances) beyond the control of the alien." Nothing "beyond the control" of Bauer took place, nor is mistaken legal advice comparable to extreme cruelty or serious illness. *Cf. Murray v. Carrier*, 477 U.S. 478 (1986) (when there is no right to counsel at public expense, a lawyer's incompetence is not the sort of external impediment that could excuse a procedural default). Bauer may or may not have received bad advice (her own affidavits don't agree on that point), but she could and should have notified the IJ and asked him to postpone or cancel the hearing. And she could have alerted Omazic to her current allegations, obtained Omazic's response, and filed a formal complaint. See *Omar v. Mukasey*, 517 F.3d 647, 651 (2d Cir. 2008) (the BIA is entitled to apply the *Lozada* procedure to complaints about the advice furnished by

non-lawyers). The BIA did not abuse its discretion in denying Bauer's motion.

The petitions for review are dismissed for want of jurisdiction on the authority of *Kucana;* but in an exercise of caution, given the grant of certiorari in *Kucana,* we alternatively deny the petitions on the merits.

APPENDIX F

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

January 12, 2010

Before
FRANK H. EASTERBROOK, *Chief Judge*
ILANA DIAMOND ROVNER, *Circuit Judge*
DIANE S. SYKES, *Circuit Judge*

CHIRSTA FAREED BAUER
Petitioner
Nos. 08-3243 & 09-1280

ERICK H. HOLDER, JR., Attorney General of the United States
Respondent.

} Petitions for Review of an Order of the Boards of Immigration Appeals.

Order

Petitioner filed a petition for rehearing on January 7, 2010. All of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

APPENDIX G

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

October 4, 2010

Mr. Allan Harvey Bell
Allan H. Bell and Associates
2022 Swift, Suite 202
North Kansas City, MO 64116

Re: Christa Bauer v. Eric H. Holder, Jr.,
Attorney General
No. 10-197

Dear Mr. Bell:

The Court today entered the following order in the above-entitled case:

The petition for a writ of certiorari is denied.

Sincerely,

William K. Suter, Clerk